

Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions

of the United States Court of Appeals for
the Federal Circuit and the United
States Court of International Trade

Vol. 24

APRIL 18, 1990

No. 16

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THE DEPARTMENT OF THE TREASURY

U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

(T.D. 90-27)

APPROVAL OF CHAMBERLAIN & ASSOCIATES AS A COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval of Chamberlain & Associates, Incorporated, as a commercial gauger.

SUMMARY: Chamberlain & Associates of Deer Park, Texas, recently applied to Customs for approval to gauge imported petroleum, petroleum products, organic chemicals, and vegetable and animal oils under part 151.13 of the Customs Regulations (19 CFR 151.13). Customs has determined that Chamberlain & Associates meets all of the requirements for approval as a commercial gauger.

Therefore, in accordance with part 151.13(f) of the Customs Regulations, Chamberlain & Associates, 1417 Roosevelt, P.O. Box 752, Deer Park, Texas 77536, is approved to gauge the products named above in all Customs districts.

EFFECTIVE DATE: March 28, 1990.

FOR FURTHER INFORMATION CONTACT: Donald A. Cousins, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 (202-566-2446).

Dated: March 28, 1990.

JOHN B. O'LOUGHLIN,

Director,

Office of Laboratories and Scientific Services.

[Published in the Federal Register, April 4, 1990 (55 FR 12618)]

(T.D. 90-28)

SYNOPSIS OF DRAWBACK DECISIONS

The following are synopses of drawback authorizations issued December 8, 1989, to February 20, 1990, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was issued.

(DRA-1-09)

Date: March 30, 1990.

File: 222249

JERRY LADERBERG,
Acting Director,
Commercial Rulings Division.

(A) Company: Alcan Aluminum Corp.

Articles: Rolled aluminum sheet; rolled aluminum foil; rolled aluminum alloy sheet; rolled aluminum alloy foil

Merchandise: Aluminum sheet in coil, non-alloyed; aluminum alloy sheet in coil

Factories: Terre Haute, IN; Louisville, KY; Fairmont, WV

Statement signed: November 3, 1989

Basis of claim: Appearing in

Rate forwarded to RC of Customs: New York, January 29, 1990

(B) Company: American Brass Co. (a limited partnership)

Articles: Copper sheet, strip, roll, bar, wire, pipe, tube or extruded shapes, either bare or coated with tin or other metallic coating

Merchandise: Copper in forms such as ingots and cathodes

Factories: Buffalo, NY; Kenosha, WI; Franklin, KY

Statement signed: January 24, 1990

Basis of claim: Appearing in

Rate issued by RC of Customs in accordance with § 191.25(b)(2): Chicago, February 20, 1990

Revokes: T.D. 84-169-C (Atlantic Richfield Co., Arco Metals Div.) to cover formation of partnership and change in factory locations

(C) Company: BASF Corp.

Articles: Anolon, cyclohexone/cyclohexanol mixture; cyclohexanol; cyclohexanone; caprolactam, molten & flake; ammonium sulfate; EP 308; polycaprolactam; nylon yarn & staple fiber

Merchandise: Cyclohexane; anolon; cyclohexanol; cyclohexanone; caprolactam extract; caprolactam molten; PC-1 pigment; polycaprolactam

Factories: Freeport, TX; Central, Allendale, & Anderson, SC; Enka, NC; Lowland, TN; Sylvania, GA

Statement signed: October 14, 1988

Basis of claim: Used in, with distribution to the products obtained in accordance with their relative value at the time of separation

Rate forwarded to RC of Customs: New York, December 27, 1989

(D) Company: Bethlehem Steel Corp.

Articles: Zinc plated or coated steel sheet and coil (galvanized steel)

Merchandise: Unwrought zinc

Factories: Bethlehem, Steelton, & Johnstown, PA; Sparrows Point, MD; Burns Harbor, IN; Lackawanna, NY

Statement signed: December 14, 1989

Basis of claim: Appearing in

Rate forwarded to RC of Customs: New York, January 8, 1990

(E) Company: Cyanamid Agricultural de Puerto Rico, Inc.

Articles: Quinoline dicarboxylic acid (QDC)

Merchandise: Oxalacetic acid diethyl ester sodium salt (DOXS)

Factory: Manati, PR

Statement signed: September 12, 1989

Basis of claim: Used in

Rate forwarded to RC of Customs: New York, February 20, 1990

(F) Company: E. I. du Pont de Nemours & Co., Inc.

Articles: Surlyn resins (ionomer)

Merchandise: Ethylene-methacrylic acid (copolymer resins)

Factory: Orange, TX

Statement signed: November 28, 1989

Basis of claim: Used in

Rate forwarded to RCs of Customs: New York & Boston (Baltimore Liquidation), February 12, 1990

(G) Company: E. I. du Pont de Nemours & Co., Inc.

Articles: Riston 3615 film

Merchandise: Riston 3615 wistock

Factory: Towanda, PA

Statement signed: March 13, 1988

Basis of claim: Appearing in

Rate forwarded to RCs of Customs: New York & Boston (Baltimore Liquidation), February 12, 1990

(H) Company: Great Lakes Chemical Corp.

Articles: Bromochlorodimethylhydantoin

Merchandise: Dimethylhydantoin

Factory: El Dorado, AR

Statement signed: November 1, 1988

Basis of claim: Used in

Rate forwarded to RC of Customs: Chicago, February 12, 1990

(I) Company: Great Lakes Chemical Corp.

Articles: Cetyl bromide

Merchandise: Cetyl alcohol

Factory: El Dorado, AR

Statement signed: November 1, 1988

Basis of claim: Used in

Rate forwarded to RC of Customs: Chicago, February 20, 1990

(J) Company: Hail & Cotton, Inc.

Articles: Scrap tobacco, blended strip and blended leaf tobaccos

Merchandise: Leaf and strip tobaccos

Factory: Springfield, TN

Statement signed: May 7, 1989

Basis of claim: Used in, with distribution to the products obtained in accordance with their relative value at the time of separation

Rate forwarded to RC of Customs: Miami, January 5, 1990

(K) Company: Hardwicke Chemical Co.

Articles: Neophyl chloride

Merchandise: Methallyl chloride

Factory: Elgin, SC

Statement signed: January 2, 1990

Basis of claim: Appearing in

Rate forwarded to RC of Customs: Miami, February 1, 1990

(L) Company: Hickson Corp.

Articles: Chromated copper arsenate wood preservatives

Merchandise: Chromic acid flake & black copper oxide

Factories: Conley, GA; Valparaiso, IN; Kalama, WA

Statement signed: January 23, 1990

Basis of claim: Used in

Rate forwarded to RC of Customs: Boston (Baltimore Liquidation), February 1, 1990

Revoques: T.D. 83-255-O (Koppers Co., Inc., Forest Products Group, Specialty Wood Chemicals Div.)

(M) Company: ICI Americas, Inc., Stahl Finish Div.

Articles: Leather and shoe finishes

Merchandise: Nitrocellulose E-560; nitrocellulose E-840; EX-508; U-5833; U-4924; QD-105; titekote H51; KP-140; Catalix GS; EX-4618; R-967; EX-0230; EX-0379; DIBK; EHA; isophorone; diacetone alcohol; alkyposal NLS; borchigel L-75; collacral P; and EX-3926 M

Factories: Peabody, MA (2)

Statement signed: January 12, 1988

Basis of claim: Used in

Rate forwarded to RC of Customs: New York, December 11, 1989

(N) Company: ICI Americas, Inc.

Articles: Topanol Ca

Merchandise: Mono-tertiary-butyl-meta-cresol (MTBMC)

Factory: Dighton, MA

Statement signed: April 2, 1987

Basis of claim: Used in

Rate forwarded to RC of Customs: Boston (Baltimore Liquidation),
December 22, 1989

Revokes: T.D. 84-194-I

(O) Company: KEMET Electronics Corp.

Articles: Tantalum capacitors and tantalum anodes

Merchandise: Tantalum powder

Factories: Greenville, Simpsonville, & Greenwood, SC; Columbus,
GA

Statement signed: November 15, 1989

Basis of claim: Used in

Rate forwarded to RC of Customs: New York, February 12, 1990

(P) Company: Eastman Kodak Co., Tennessee Eastman Company
Div.

Articles: Acetoacet-2, 4-xyldine (AAMX)

Merchandise: 2, 4-xyldine (m-xyldine)

Factory: Kingsport, TN

Statement signed: January 25, 1989

Basis of claim: Appearing in

Rate forwarded to RC of Customs; Boston (Baltimore Liquidation),
February 12, 1990

(Q) Company: Metalvuoto Films, Inc.

Articles: Metalized plastic films

Merchandise: Polyester film; polypropylene film; polyamide film

Factory: Creedmore, NC

Statement signed: October 12, 1989

Basis of claim: Used in

Rate forwarded to RC of Customs: Miami, January 29, 1990

(R) Company: Mobay Corp.
Articles: Desmodur W
Merchandise: Methylene bis (4-cyclohexylamine) a/k/a PACM-20
Factories: Baytown, TX; New Martinsville, WV
Statement signed: March 28, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, February 12, 1990

(S) Company: Morflex Chemical Co., Inc.
Articles: Dimethyl sebacate
Merchandise: Sebacic acid; methanol
Factory: Greensboro, NC
Statement signed: October 12, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, December 8, 1989

(T) Company: Morflex Chemical Co., Inc.
Articles: Dimethyl iso phthalate
Merchandise: Methanol
Factory: Greensboro, NC
Statement signed: October 12, 1989
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, December 11, 1989

(U) Company: Morton International, Inc.
Articles: Color dyes
Merchandise: Dye intermediates
Factory: Patterson, NJ
Statement signed: October 3, 1989
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2):
New York, January 8, 1990
Revokes: T.D. 83-259-S to cover name change from Morton Thiokol
Inc.

(V) Company: Pfizer, Inc.
Articles: Deoxyribose syrup
Merchandise: Deoxyribose anilide
Factory: Groton, CT
Statement signed: September 20, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, December 21, 1989

(W) Company: Pfizer, Inc.
Articles: Ampicillin blends
Merchandise: Ampicillin sodium sterile
Factory: Terre Haute, IN
Statement signed: March 6, 1989

Basis of claim: Used in

Rate forwarded to RC of Customs: New York, February 12, 1990

(X) Company: Sterling Chemicals, Inc.

Articles: Acrylonitrile

Merchandise: Propylene; catalysts NS-733CF and NS-733DF

Factory: Texas City, TX

Statement signed: January 20, 1989

Basis of claim: Used in, with distribution to the products obtained in accordance with their relative value at the time of separation

Rate forwarded to RCs of Customs: New York & Houston, January 10, 1990

(Y) Company: Transbas, Inc.

Articles: Herbicides

Merchandise: 2-(2,4-dichlorophenoxy) propionic acid (2,4-DP); 2,4-dichlorophenoxyacetic acid (2,4-D); 2-methyl-4-chlorophenoxyacetic acid (MCPA); 2-(2-methyl-4-chlorophenoxy) propionic acid (MCPPE)

Factory: Billings, MT

Statement signed: November 3, 1988

Basis of claim: Used in

Rate forwarded to RC of Customs: Los Angeles (San Francisco Liquidation), February 20, 1990

T.D. 89-11-T

(Z) Company: United States Mineral Products Co.

Articles: Fire proofing material

Merchandise: Mineral wool

Factories: Stanhope, NJ; Huntington, IN; Lamirada, CA

Statement signed: September 8, 1989

Basis of claim: Used in

Rate forwarded to RC of Customs: New York, February 12, 1990

(T.D. 90-29)

CANCELLATION WITH PREJUDICE OF INDIVIDUAL
CUSTOMS BROKER LICENSE NO. 6471; LEONARD H. DAVIS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that the Commissioner of Customs, on March 14, 1990, pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and section 111.51(b) of the Cus-

toms Regulations, as amended (19 CFR 111.51(b), cancelled with prejudice the individual broker's license no. 6471 issued to Leonard H. Davis, New York, on March 12, 1980.

Dated: April 2, 1990.

VICTOR G. WEEREN,
Director,
Office of Trade Operations.

[Published in the Federal Register, April 6, 1990 (55 FR 12984)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 141

BLANKET RELEASE ORDERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to permit the use of blanket release orders by carriers in appropriate circumstances. A 1987 amendment to the Regulations which eliminated several Customs Forms also inadvertently eliminated all references to blanket release orders. It had not been the intention that the orders be eliminated. In order to clarify the status of these orders, this amendment of the regulations is proposed which will expressly permit use of blanket release orders.

DATE: Comments must be received on or before June 4, 1990.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, Room 2119, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John Pfeifer, Office of Cargo Enforcement, U.S. Customs Service (202) 566-5354.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In 1987, as part of an ongoing effort to streamline its operations, the Customs Service issued T.D. 87-75 which eliminated Customs forms that were determined to require the submission of information already provided to Customs by other means. Among the forms which were eliminated was CF 7529, entitled Carrier's Certificate and Release Order. It had been determined that this form was unduly burdensome in that the information sought on that form could be supplied in another manner using existing trade documentation as prescribed in 19 CFR 141.11(a).

Unfortunately, blanket release orders as prescribed in 19 CFR 141.11(a)(5) and 141.111(c) specifically required the filing of a CF 7529. When T.D. 87-75 was issued, this fact was overlooked. It had not been Customs intent to disallow the use of blanket release orders in appropriate situations. A blanket release order is a right-to-make-entry document for formal or informal entry procedures. It can be effective for the duration specified in the document.

Accordingly, Customs is now proposing to amend the regulations to specifically permit the use of blanket release orders by carriers. The regulations will permit appropriately modified bills of lading or air waybills to be used as blanket release orders.

COMMENTS

Before adopting the proposed amendment, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 141

Customs duties and inspection; Imports.

AMENDMENTS TO THE REGULATIONS

It is proposed to amend Part 141, Customs Regulations (19 CFR Part 141) as set forth below:

PART 141—ENTRY OF MERCHANDISE

1. The general and relevant specific authority citation for Part 141 would continue to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

Subpart B also issued under 19 U.S.C. 1483.

* * * * *

2. Section 141.11 is amended by removing the designation "Reserved" in subparagraph (a)(5), and adding a new paragraph to read as follows:

§ 141.11 Evidence of right to make entry for importations by common carrier.

(a) * * *

(5) A blanket carrier's release order on an appropriately modified bill of lading or air waybill covering any or all shipments which will arrive within the district on the carrier's conveyance during the period specified in the release order.

* * * * *

3. Section 141.111 is amended by removing the designation "Reserved" in subparagraph (c), and by adding a new paragraph to read as follows:

§ 141.111 Carrier's release order.

* * * * *

(c) *Blanket release order.* Merchandise may be released to the person named in the bill of lading or air waybill in the absence of a specific release order from the carrier, if the carrier concerned has filed a blanket order authorizing release to the owner or consignee in such cases. A carrier's certificate in the form shown in § 141.11(a)(4), may be modified and executed to make it a blanket release order for the shipments covered by a blanket carrier's release order under § 141.11(a)(5).

* * * * *

MICHAEL H. LANE,

Acting Commissioner of Customs.

Approved: March 28, 1990.

PETER K. NUNEZ,

Assistant Secretary of the Treasury.

[Published in the Federal Register, April 3, 1990 (55 FR 12385)]

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U.S. Court of Appeals for the Federal Circuit

OLYMPIC ADHESIVES, INC., PLAINTIFF-APPELLANT v.
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 89-1367

(Decided March 28, 1990)

Gail T. Cumins, Sharretts, Paley, Carter & Blauvelt, P.C., of New York, New York, argued for plaintiff-appellant. With her on the brief was *Ned H. Marshak*.

Platte B. Moring, III, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General and *David M. Cohen*, Director. Also on the brief were *Stephen J. Powell*, Chief Counsel for Import Administration and *Gregory D. Shorin*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, of counsel.

Appealed from: U.S. Court of International Trade.

Judge MUSGRAVE.

Before *NIES*, *Circuit Judge*, *BALDWIN*, *Senior Circuit Judge*, and *MICHEL*, *Circuit Judge*.

NIES, *Circuit Judge*.

This appeal is from the final judgment of the Court of International Trade in *Olympic Adhesives, Inc. v. United States*, 708 F. Supp. 344 (Ct. Int'l Trade 1989) (Musgrave, J.). Animal glue imported from Sweden has been subject to an antidumping order imposed by the Treasury Department on August 3, 1977.¹ The original investigation found that the dumping margin for Swedish glues was 92.72%. In the first review of the amount of duties following the order which covered the period August 3, 1977, through May 31, 1978, Treasury found that there were no sales at less than fair value and, thus, no dumping duties were due. This appeal concerns the next review period for which the International Trade Administration (ITA), now responsible for conducting such reviews, reimposed the original 92.72% duty rate. The ITA did not base this rate on sales data during the review period. Rather, the ITA found that the Swedish manufacturer, Extraco Geltec AB, failed to supply certain requested information. In reliance on that finding, the ITA resorted to its authority, under 19 U.S.C. § 1677e(b) (1982) (redesignated in

¹See 42 Fed. Reg. 39288-89 (1977).

1988 as § 1677e(c)² as implemented by 19 C.F.R. 353.51(b) (1988), to use the "best information available" to determine the amount of the duty. In the ITA's judgment, the "best information" on the dumping margin for the review period was the 92.72% margin found in the original investigation. The United States importer of Swedish glue, who must pay the duty, is appellant Olympic Adhesives, Inc. Olympic brought suit in the Court of International Trade challenging the ITA's resort to the "best information" rule on the record of this case, and asserting that, in any event, the ITA did not use the "best information available." Rejecting both of these positions, the Court of International Trade affirmed the ITA's determination of the duty rate. Because we agree with the first of Olympic's arguments, we reverse and remand with instructions.

I

BACKGROUND

The 1977 antidumping duty investigation into animal glue and inedible gelatin imported from Sweden involved only one Swedish producer, Extraco Geltec AB, and only one U.S. importer, Olympic Adhesives. At that time, Extraco was selling animal glue to Olympic primarily in grades 12, 16, and 20, which grades Extraco also sold to unrelated purchasers in Sweden. A comparison of U.S. and Swedish prices on these grades yielded the initial dumping margin of 92.72%. 42 Fed. Reg. 39288-89 (1977).

The first administrative review was conducted by the Treasury Department and covered the period from August 3, 1977 to May 31, 1978. For that review period, Extraco reported no sales to Olympic of animal glue grades 12, 16, and 20. It did report sales to Olympic and to one Swedish customer of grades 14, 18, and 22. The comparison of the respective prices for these grades resulted in a determination that grades 14, 18, and 22 glues were not being sold at less than fair value (LTFV) during this review period. *Olympic Adhesives*, 708 F. Supp. at 346.

Before the second review was completed by Treasury, responsibility for conducting the review was transferred to the ITA. Treasury had been reviewing the period June 1, 1978 to December 31, 1978. The ITA expanded this review through November 30, 1980, but treated it as two periods divided at January 1, 1979. In response to the ITA's request for information regarding Extraco's sales subject to the dumping order for the extended period, Extraco again supplied information on sales of 14, 18, and 22 grade glues to Olympic in the United States and to the same single company in Sweden. On May 19, 1981, the ITA verified Extraco's responses by an investigation in Sweden. Based on the information supplied by Extraco and verified by the ITA, the ITA published its preliminary determina-

²See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1331(1) (codified as amended at 19 U.S.C. § 1677e).

tion that the dumping margin on sales to Olympic during the period from June 1, 1978 through December 31, 1978, was 8.95%, and that the margin on sales during the period January 1, 1979 through November 30, 1980, was 1.93%. See 46 Fed. Reg. 41540-41 (August 17, 1981).

Following the preliminary determinations of the above rates, the U.S. glue industry objected to the ITA, asserting that the data supplied by Extraco was questionable and might not reflect sales made in the ordinary course of trade, as required for the ITA's determination of the amount of the duty. It suggested that Extraco was in fact selling grades 12, 16, and 20 but designating them as "new grades" 14, 18, and 22; that these "new grades" were not known in Europe; and that because there was only one home market purchaser of the "new grades", the Swedish sales could have been contrived. It also noted the great drop in volume of Extraco's reported total sales compared to its capacity and surmised that all sales had not been reported.

The above assertions by the U.S. glue industry concerning the alleged identity of the "old" and "new" grades and the possibility of contrived sales were not supported by any direct evidence either before or at a hearing held by the ITA to consider the objections. Counsel for the U.S. glue industry simply posited the theory that there could have been an agreement or arrangement between Extraco and Olympic to denominate the grades of the initial investigation (12, 16 and 20) as different grades in the annual review (14, 18 and 22) and between Extraco and its single Swedish customer to make enough purchases of these "new" grades to establish a home market price. Counsel pointed to the tremendous reduction in the dumping margin as, in itself, raising a suspicion of falsification.

If the domestic industry's theory were true, the reported Swedish sales could not be used to determine the foreign market value under 19 U.S.C. § 1677b(a) (1982) which then read:³

(a) Determination; fictitious market; sales agencies

For the purposes of this subtitle—

(1) In general

The foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States—

(A) at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption, * * *

³Amendments have since been made to the introductory paragraph which have no significance in this case. See 19 U.S.C. § 1677b(a) (1988).

In the ascertainment of foreign market value for the purposes of this subtitle *no pretended sale* or offer for sale, and *no sale or offer for sale intended to establish a fictitious market*, shall be taken into account. [Emphasis added.]

The applicable implementing regulation, 19 C.F.R. § 353.18 (1988) similarly provides:

In determining foreign market value, no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, will be taken into account.

In response to the objections, the ITA initially defended its preliminary determinations of 8.95% for the 1978 period and 1.93% for 1979-1980. It found nothing suspect in the drop in margin inasmuch as the imposition of antidumping duties is intended to achieve precisely that effect. However, it reopened its investigation to look into the specific assertions of the U.S. glue industry.

The assertion that the glue grades purchased by Olympic had merely been redesignated turned out to be baseless. Extraco had, in fact, sold two other grades of glue (17 and 25-S) to Olympic even during the original investigation period, albeit in small amounts. Further, information supplied by Olympic established, without contradiction, that the three suspect grades (14, 18 and 22) were standard grades of glue which Olympic had been purchasing from other sources prior to the publication of the initial antidumping duty finding. Finally, test reports proved that the glues were in fact 14, 18 and 22 grades, not 12, 16 and 20.⁴ That asserted basis for the U.S. industry's theory of fictitious sales was wholly unsupported.

Extraco's drop in overall production and decreased sales to the United States also were proved to be genuine. The record showed that because of a decline in the production of English bone china to which Extraco sold processed bones, Extraco began to limit its production of glue and, before the renewed investigation was over, Extraco had gone out of the glue business entirely.

The remaining allegation of the U.S. industry was that the information on Swedish sales was falsified or incomplete. As indicated, the reported transactions had been investigated prior to the preliminary determinations and were found to be in order. Even minor discrepancies in Extraco's records, *e.g.*, a failure to deduct a 2% discount on a few sales, were resolved after the ITA's investigative trip.

The ITA pursued the matter of Swedish sales by first contacting Olympic to obtain more information from Extraco with respect to Extraco's sales of grades 14, 18 and 22. On November 11, 1981, Olympic forwarded telexes from Extraco which provided the answers to all of these questions. Specifically, Extraco answered that (1) it had continuously offered grades 14, 18 and 22 to Swedish customers since January 1978; (2) its single Swedish customer manu-

⁴The validity of the grades was determined by a comparison of relative jelly strengths.

factured water-remoistenable sealing tape; and (3) it switched to grades 14, 18 and 22 at Olympic's request, because it had the capability to do so, and it was able to sell these grades in Sweden also.

By letter dated November 19, 1981, the ITA submitted a questionnaire directly to Extraco advising that counsel for the domestic industries raised issues concerning whether the reported sales were made in the ordinary course of trade which "the Department believes Extraco can clarify by answering the enclosed questions. Failure to respond to this request may result in [use of the original 92.72% margin on sales in the relevant period]." Questionnaires were also sent to Extraco on November 25, 1981 (apparently the same as above), and on December 21, 1981 (contents unknown, but which may have asked, in addition, about sales to the United States via London brokers).

Extraco replied on January 8, 1982, advising that it did not control European brokers and could not answer questions concerning their sales to the United States. It further advised that it had reduced its production from 4,000 tons in 1978, to 1,500 tons in 1981; that it had stopped all sales to the United States in July 1981; that it enclosed its answer to the November '81 questionnaire; but that because of a decrease in staff, "we have small possibilities to continue answering further questionnaires [sic], and considering the fact that we no longer sell any glue to the United States we presume that it would not be needed either."

In May 1982, the ITA sent another questionnaire to Extraco by telex raising a different objection to the information on Swedish sales of grades 14, 18, and 22 which had been supplied. This questionnaire stated that for the periods, January 1, 1979 through November 30, 1980, and for December 1, 1980 through November 30, 1981, the Swedish sales "were not close in time to U.S. sales." Nothing was said about the June-December 1978 review period. By this time, it is apparent that the ITA had already begun its review for the next year inasmuch as the telex refers to Extraco's responses omitting some sales for the period December 1980 through November 1981, apparently on still another questionnaire. Extraco's sales manager immediately responded to the telex by telephone that the company would not or could not answer. However, it appears that some matters were resolved as shown by the ITA's determination of a duty of 3.01% for the December 1980 to November 1981 period. See 49 Fed. Reg. 39883 (October 11, 1984).

On January 24, 1983, Extraco sent a letter to the ITA in response to the ITA's letter of December 30, 1982 (contents unknown), which referred to yet another request for information covering the review period December 1, 1981—November 30, 1982. In its January 1983 letter, Extraco stated it was no longer producing any animal glue; that its sales to the United States had stopped in July 1981; and that it had no people who could answer the ITA's questions. No further contacts apparently were made between the ITA and Extraco.

On September 9, 1983, the ITA published the final results of its review for the period June 1, 1978, through November 30, 1980, which imposed the 92.72% duty. See 48 Fed. Reg. 40769-70 (1983). The entirety of its explanation for overturning its preliminary determinations of 8.95% and 1.93% duty rates for the review periods is the following: "Based on Extraco's failure to provide home market sales data for similar merchandise, we cannot resolve the petitioners' [i.e., the domestic industry's] allegation that home market sales of the three grades were not in the ordinary course of trade."⁶ Therefore, the ITA determined it could use "best information available" and found that to be the original 92.72% margin.

Olympic timely contested the final results of the administrative review on the grounds that, *inter alia*, the ITA was not entitled to resort to the best information rule as authorized by 19 U.S.C. § 1677e(b) and implemented by 19 C.F.R. § 353.51(b). Olympic asserted that the ITA did not comply with the regulatory requirements for notification that Extraco's answers were deficient; that Extraco, in any event, supplied all requested information; and that any inability of the ITA to make a determination regarding whether the home market sales of glue were not in the ordinary course of trade resulted from the ITA's failure to conduct a proper investigation rather than any deficiency in the information supplied by Extraco. Rejecting Olympic's arguments, the trial court found that the ITA had no affirmative legal duty to supplement the administrative record and that the ITA had on "several occasions" requested that Extraco supply it with certain information relevant to the ordinary course of trade determination. The trial court further found that Extraco failed to adequately supply the requested information, either because it was no longer able to do so or because it simply refused. The trial court concluded that, after the ITA received Extraco's January 24, 1983 letter, the ITA was not "entirely unjustified" in resorting to the best information available. *Olympic Adhesives*, 708 F. Supp. at 350. On appeal, Olympic argues that the trial court decision sustaining the ITA's determination under the "best information available" rule was contrary to law and not supported by substantial evidence.

⁶48 Fed. Reg. at 40769.

(2) *Comment:* The petitioners allege that home market sales of three grades (collexes 14, 18, and 22) were not made in the ordinary course of trade but were made to create a fictitious market, within the meaning of section 773(a) of the Tariff Act.

Department's Position: Based on Extraco's failure to provide home market sales data for similar merchandise, we cannot resolve the petitioners' allegation that home market sales of the three grades were not in the ordinary course of trade. As a result, we have used the best information available to determine the assessment and estimated duty cash deposit rate. The best information available is Extraco's fair value rate.

II

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over this appeal under 28 U.S.C. § 1295(a)(5) (1982). Olympic brought this action pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (1988) which permits any interested party to commence an action in the Court of International Trade to review, *inter alia*, "[a] final determination, * * * by the administering authority [the ITA] * * * under section 1675 of this title."⁶ The applicable standard for judicial review of this ITA determination is prescribed by 19 U.S.C. § 1516a(b)(1) (1988):

The court shall hold unlawful any determination, finding, or conclusion found—

* * * * *

(B) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

In the appeal before us, we are presented with a situation involving two-tiered appellate review of agency action⁷ which is to be reviewed on the administrative record under the above standard. In reviewing the trial court's affirmance of ITA's dumping duty assessment, we must decide whether the trial court correctly concluded that ITA's determination is in accordance with the law and supported by substantial evidence. As aptly stated in *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984), with regard to appeals under this statute, "[w]e review that court's review of an [agency] determination by applying anew the statute's express judicial review standard."

III

OPINION

The question raised in this appeal is whether the ITA's action in imposing the 92.72% duty on animal glues from Sweden during the years in question is authorized under 19 U.S.C. § 1677e(b) (1982) which provides:

(b) Determinations to be made on best information available

In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person *refuses or is unable to produce information requested* in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available [emphasis added];

and in accordance with the applicable implementing regulation, 19 C.F.R. § 353.51(b) (1988), which provides in pertinent part:

⁶§ 1675 governs Administrative reviews of antidumping duty orders. See 19 U.S.C. § 1675 (1988).

⁷See S. Childress, *Standards of Review* § 14.7 (1986).

(b) Whenever information cannot be satisfactorily verified, or is not submitted in a timely fashion or in the form required, the submitter of the information will be notified and [sic] the affected determination will be made on the basis of the best information then otherwise available which may include the information submitted in support of the petition. An opportunity to correct inadequate submissions will be provided if the corrected submission is received in time to permit proper analysis and verification of the information concerned; otherwise no corrected submission will be taken into account.

Assuming for purposes of analysis that the 92.72% duty rate would be based on "the best information otherwise available," we cannot agree that the facts here, which are essentially undisputed, justify the ITA's invocation of this authority.

The basic error we perceive arises from the ITA's overly sweeping view of the authority it is granted under section 1677e(b). In essence, the ITA interprets the phrase "whenever a party * * * refuses or is unable to produce information requested" to cover, in the ITA's discretion, any inadequacy or insufficiency of a reply to a request for any type of information. Indeed, even where a reply is *complete*, the ITA may, as it did in this case, conclude that the information does not answer a question it wishes to resolve, and for that reason *the party* is deemed to "refuse" or "be unable to supply" information within the meaning of the statute. We cannot agree that the ITA's authorization under section 1677e(b) extends so far.

In *Atlantic Sugar*, 744 F.2d at 1560, this court recognized that one may view section 1677e(b) as giving an agency (there, the ITC) some leverage against recalcitrant or noncooperative parties because the agency is required to "arrive at *some* determination." We agree that the ITA cannot be left merely to the largesse of the parties at their discretion to supply the ITA with information. This is particularly the case when the ITA is attempting to obtain information to conduct statutorily mandated administrative reviews because unlike ITC, the ITA has no subpoena power. See, e.g., *Pistachio Group of the Ass'n of Food Indus. v. United States*, 671 F. Supp. 31, 40 (Ct. Int'l Trade 1987). Thus, if the responses provided to an information request are only partially complete in that not all questions requiring a response are answered or answers to questions do not fully or accurately supply the information requested, partial completeness under section 1677e(b) may justify resort to the best information rule. See, e.g., *Chinsung Indus. Co. v. United States*, 705 F. Supp. 598, 600-01 (Ct. Int'l Trade 1989); *Ceramica Regionmontana, S.A. v. United States*, 636 F. Supp. 961, 966-67 (Ct. Int'l Trade 1986) (resort to best information available justified in countervailing duty determination where requested information as supplied was inaccurate in significant and material respects); *Ansaldo Componenti, S.p.A. v. United States*, 628 F. Supp. 198, 205 (Ct. Int'l Trade 1986) (resort to best information available justified where submissions to

requests for information consistently partially complete); *Tai Yang Metal Indus. Co. v. United States*, 712 F. Supp. 973, 977 (Ct. Int'l Trade 1989) (resort to best information available justified where party served with questionnaire does not submit any answer even amidst assertion that party lacked financial capacity to assemble requested information). Otherwise, alleged unfair traders would be able to control the amount of antidumping duties by selectively providing the ITA with information. See, e.g., *Pistachio Group*, 671 F. Supp. at 40; *Chinsung Indus.*, 705 F. Supp. at 601.

On the other hand, the ITA has not been given power that can be "wielded" arbitrarily as an "informal club." *Atlantic Sugar*, 744 F.2d at 1560. For example, the ITA may not properly invoke section 1677e(b) by making repeated requests for information which a party has already submitted until the party becomes frustrated and refuses to comply. Nor may it characterize a party's failure to list and give details of sales as a "refusal" or "inability" to give an answer where, in fact, there are no sales.

In the notice of final determination in this case, the ITA states that the reason for resort to the best information rule is that Extraco failed "to provide market sales data for *similar* merchandise." In its brief, the ITA relies solely on Extraco's alleged failure to supply data relating to grades 14, 18, and 22, and the parties' arguments as well are limited to those products. An agency may not, of course, shift the grounds it relied upon for taking action. As stated in *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." An initial question, therefore, is whether grades 14, 18, and 22, which are *identical* to the U.S. grades, are "similar" goods within the meaning of the above notice of final determination. We conclude that they are. In the May '82 telex, grades 14, 18 and 22 are denominated *similar* goods. Moreover, under 19 U.S.C. § 1677(16) (1988), which defines "such or similar merchandise," the ITA would have to make its calculations of duty on grades 14, 18, 22 if it has valid data respecting those grades.⁸ Thus, we conclude that the published notice is based on Extraco's alleged failure to supply requested data on grades 14, 18, and 22 which caused the fictitious market issue to be resolved against Extraco. Accordingly, the propriety of the ITA's invocation of the "best information" rule depends on (1) whether Extraco's responses to information requests relating to grades 14, 18, and 22 were deficient in connection with the fictitious market issue, and (2) whether the ITA gave Extraco warning and an opportunity to correct any such deficiencies.

⁸19 U.S.C. § 1677(16) provides, in pertinent part:

(16) Such or similar merchandise

The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:

(A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise * * *. [Emphasis added.]

The ITA correctly notes that its letter accompanying the November '81 questionnaire contained an appropriate advance warning that complete answers were required to avoid the ITA's resort to the best information available. This multipage questionnaire was answered in January 1982, and it is the allegedly inadequate answers to part of this questionnaire on which the ITA seeks to lay the foundation for invoking its § 1677e(b) authority. In one section of the questionnaire, the ITA asked a series of questions about Extraco's sales of grades 14, 18, and 22 to other countries prior to January 1978. Extraco had responded that it began producing grades 14, 18, and 22 in the fall of 1977, and that no such sales were made prior to January 1, 1978. The ITA maintains that Extraco's answers to these questions were deficient because Extraco listed no sales to other countries. In another section of the questionnaire, the ITA had asked, "Has any other customer in Sweden [other than the one customer for which data was given] ever purchased collex 14, 18, or 22?" to which Extraco replied, "No." The ITA maintains that this answer is deficient because Extraco "listed only one purchaser of Collexes [glues] 14, 18 and 22 in Sweden."

The ITA characterizes Extraco's conduct as a "refus[al] to provide the requested data." Contrary to the ITA's view, a "No" answer is not a refusal to provide data. If there is no data, "No" is a complete answer. Moreover, Extraco stated that it did not begin making grades 14, 18, 22 until the fall of 1977, and that the Swedish customer first ordered the glues on December 9, 1977. These answers are entirely consistent with its answers that it made no sales of these grades to Europe or third countries prior to January 1, 1978.⁹ The ITA points to the statutory language that it may use "best information available" when a submitter is "unable to produce information requested." The ITA is not so bold as to say explicitly this means it may resort to the "best information" rule where a submitter cannot produce data because such data never existed. In essence, however, that is its interpretation of its section 1677e(b) authority here, and we reject it.

But assuming the ITA did have reason to pursue the fictitious market allegations further, the ITA had to comply with 19 C.F.R. § 353.51(b) requiring it to give notice to Extraco of perceived inadequacies of the responses to the November '81 questionnaire. The required notice, per the ITA, was provided in the May '82 telex. We disagree.

In the November '81 questionnaire, as indicated, the ITA was pursuing an inquiry into whether Extraco's sales to its U.S. and Swedish customer were in the ordinary course of trade or were fictitious sales. The ITA stated expressly in the accompanying letter that the answers to the questions in that questionnaire would likely

⁹That Extraco left blank a number of other subquestions dealing with sales of grades 14, 18, and 22 is also entirely consistent because answering these subquestions was contingent upon having sales to Europe or third countries prior to January 1, 1978.

resolve that issue. The ITA's telex, on which the ITA relies as notice, did not tell Extraco to amplify its responses to the November '81 questionnaire concerning the fictitious sales issue. On the contrary, the ITA raised a new objection, namely, that some of the Swedish sales of grades 14, 18, and 22, during part of the investigation period, were not "close in time" to the U.S. sales.¹⁰ There is no mention of their being fictitious. As far as this record shows, the inquiry into whether or not the reported sales were made in the ordinary course of trade was never pursued after Extraco's response to the November '81 questionnaire. Thus, the May '82 telex did not give notice of deficiencies in answers to the November '81 questionnaire. Moreover, the May '82 telex simply asked for data on additional sales of grades 14, 18, and 22 as before, albeit for a different reason, sales which Extraco had previously reported were nonexistent.¹¹

Nothing in the record suggests that Extraco did, in fact, withhold any information on sales of grades 14, 18, and 22. To show that Extraco's responses were incomplete, the ITA would have to put forth at least some evidence tending to suggest that the answers provided by Extraco were inaccurate (e.g., that sales to other purchasers during the period were not listed). There is none. Moreover, most of the same information had been supplied with respect to sales of grades 14, 18, and 22 prior to the preliminary determination, and the ITA had already verified the existence of the reported sales. The exasperation of Extraco's officials in being asked to supply the information for a third time is understandable.

It may well be that the information provided by Extraco in response to the November '81 questionnaire was "incomplete" or "deficient" in the sense that the ITA did not obtain information which unequivocally negated or established the allegation that the home market sales were fictitious. But we agree with Olympic that this "incompleteness" or "deficiency" is not attributable to any deficiency in the answers provided by Extraco.¹² The ITA may not properly conclude that resort to the best information rule is justified in circumstances where a questionnaire is sent and completely answered, just because the ITA concludes that the answers do not definitely resolve the overall issue presented. Although the ITA may properly request additional supplemental information, if needed, to fully resolve the issue, section 1677e(b) clearly requires *noncompliance with an information request* before resort to the best information rule is justified, whether due to refusal or mere inability. See, e.g., *Daewoo*

¹⁰The ITA does not assert this deficiency as the reason for its resort to the best information rule. In any event, the ITA had verified the dates of these sales and at least 50% were within its 90/45-day rule. Had only the close-in-time sales been used, it appears there would have been no LTFV sales.

¹¹The ITA does not rely on the failure to supply other information requested in the May 19, 1982 telex besides information covering its requests for sales of grades 14, 18, and 22. No further contact was made relating to the subject review periods and, thus, the ITA does not even argue that it gave the required notice respecting any failure to supply other information requested by that telex.

¹²For example, the ITA argues in its brief that the price structure for home market sales of grades 14, 18, and 22 was not consistent with the price structure for home market sales of grades 12, 16, and 20. No questions were, however, directed to this alleged "inconsistency."

Elec. Co. v. United States, 712 F. Supp. 931, 944 (Ct. Int'l Trade 1989). The ITA suggests that Extraco should have made efforts apart from the questionnaire to rebut the allegations of fictitious sales. However, section 1677e(b) does not place that obligation on the submitter.¹³ To avoid the threat of § 1677e(b), a submitter need only provide complete answers to the questions presented in an information request.

In sum, because Extraco did not fail to provide the information requested in the November '81 questionnaire with respect to sales of grades 14, 18, and 22, this questionnaire provides no substantial evidence indicating that Extraco "refused" or "was unable" to supply the ITA with information within the meaning of those terms in the statute. Moreover, the May '82 telex did not give notice that Extraco's answers were deficient with respect to the allegation that the reported sales of grades 14, 18, and 22 were fictitious. The ITA could not, therefore, justifiably resort to the "best information" rule.

IV

CONCLUSION

Because the ITA's decision to use the best information rule did not comply with the statutory requirements of 19 U.S.C. § 1677e(b) and the regulatory requirements of 19 C.F.R. § 353.51(b), the judgment of the Court of International Trade must be reversed. Further, due to the passage of time, Extraco's 1981 exit from the production of bone glues,¹⁴ the lack of any evidence supporting the fictitious home market sales allegation, and in the interests of judicial economy, we remand this cause to the Court of International Trade with instructions to direct the ITA to assess antidumping duties in accord with the margins determined in the preliminary investigation for the years in question.

V

Costs

Costs are awarded to Olympic Adhesives, Inc.

REVERSED AND REMANDED

¹³Moreover, Extraco did fully rebut the principal allegation that grades 14, 18, and 22 were grades 12, 16, and 20 in disguise and further explained the drop in its total production.

¹⁴The domestic industry took no part in these proceedings. Apparently, the animal glue industry has suffered a world-wide decline.

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

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Edward D. Re

Judges

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Gregory W. Carman
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Decisions of the United States Court of International Trade

(Slip Op. 90-25)

CITIZEN WATCH CO., LTD., ET AL., PLAINTIFFS V. UNITED STATES, DEFENDANT

Court No. 88-01-00046

MEMORANDUM OPINION AND ORDER

CHANGED CIRCUMSTANCES—ANTIDUMPING ORDER REVIEW BY INTERNATIONAL TRADE COMMISSION—LCD TVs

The Court holds that the initial finding of "changed circumstances" which sets an administrative antidumping order review in motion does not close the issue of whether changed circumstances exist and does not compel the International Trade Commission to reach the ultimate questions of injury in the review proceeding. In this case, the ITC was acting within its authority when, after finding that a review was justified because of the putative differences between liquid-crystal (LCD) televisions and cathode ray televisions, it concluded that plaintiffs had failed to show that the LCD TVs were in fact sufficiently different so as to constitute a product unlike the television receivers which are subject to the antidumping duty order. This ultimate finding as to a lack of changed circumstances was sufficient to support the decision not to exclude LCD TVs from the scope of the antidumping duty order and was supported by substantial evidence.

[Judgment for defendant.]

(Decided March 15, 1990)

Weil Gotshal & Manges (Stuart M. Rosen, A. Paul Victor, Randolph W. Tritell and Lisa J. Frank, of counsel) for plaintiffs.

Lyn M. Schlitt, General Counsel, *James A. Toupin*, Assistant General Counsel (Craig L. McKee and Stephen A. McLaughlin, attorneys, Office of the General Counsel) for defendant.

WATSON, Judge: This is an action in which plaintiffs challenge the determination of the International Trade Commission ("Commission") not to exclude liquid crystal display televisions ("LCD TVs.") from the scope of an antidumping duty order. Liquid crystal display televisions employ a flat panel display in which liquid crystals are sandwiched between two sheets of glass and, when stimulated by a grid of transistors which has been applied to one of the glass plates, act as optical shutters to display moving images. The determination at issue here was made in *Liquid Crystal Display Television Receivers From Japan*, Inv. No. 751-TA-14, USITC Pub. 2042 (December, 1987), 48 Fed. Reg. 48,583 (Dec. 23, 1987). It represented a decision by the Commission that the 1971 antidumping duty order issued

against television sets from Japan as a result of its determination in *Television Receiving Sets from Japan*, TD 71-76, 36 Fed. Reg. 4576 (1971) should not be modified pursuant to the review procedures set out in 19 U.S.C. § 1675(b).¹ The antidumping order that was subject to review in this proceeding was issued on March 9, 1971 and covered all television receivers from Japan.

In its original investigation the Commission chose not to differentiate between television receivers on the basis of screen size or the technology used. For example, they drew no distinction between color and monochrome television receivers. In that determination, in subsequent investigations, as well as in reviews covering television receivers from Japan, the Commission has treated all television receivers as constituting a single like product. It has rejected arguments that differences in such factors as screen size, model types, tuning mechanisms, or style of cabinetry were sufficient to make certain television receivers other than like products. See, for example *Television Receiving Sets from Japan*, Inv. No. 751-TA-2, USITC Pub. 1153 (June, 1981) and *Color Television Receivers from the Republic of Korea and Taiwan*, Investigation Nos. 731-TA-134 and 135 (Final) USITC Pub. 1514 (April, 1984). In the first review investigation regarding television receivers from Japan, the Commission rejected an attempt to modify the antidumping order to exclude certain television receivers on the basis of their small screens. *Television Receiving Sets from Japan*, Investigations No. 751-TA2, USITC Pub. 1153 at 19-20 (June 1981).

The Commission has taken the position that although at the time of the original investigation and subsequently as well, the method of display in virtually all imported television receivers was by cathode ray tube ("CRT"), the variety of other display methods such as projection televisions, gas discharge display televisions, electro-luminescent display televisions, and the liquid crystal display televisions here at issue, are essentially the same product as that which was originally investigated.

In July of 1984, a producer of imported LCD televisions requested the Department of Commerce ("Commerce") to exclude LCD televisions from the scope of the outstanding order covering all television receivers from Japan. That request was based on a claim that LCD televisions do not contain a cathode ray tube and, due to their small screen size, do not compete with domestic televisions. In June of 1985 Commerce rejected that request and reasoned that because LCD televisions were capable of both receiving a broadcast signal and projecting a video image they were the same class or kind of merchandise as the television receivers which were within the scope of the finding. Commerce advised plaintiffs that a request founded

¹Whenever * * * the Commission receives information concerning, or a request for the review of, * * * an affirmative determination made under section * * * 1673(a) * * * of this title, which shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a review * * *. During an investigation by the Commission, the party seeking revocation of an antidumping or countervailing duty order shall have the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant revocation of the antidumping or countervailing duty order.

upon an allegation that the domestic industry was not being injured by the importation of LCD televisions should be directed to the International Trade Commission.

On May 11, 1987, plaintiffs filed a *Request for Review of Changed Circumstances Warranting Modification of Antidumping Finding Respecting Monochrome and Color Television Receiving Sets from Japan to Exclude Liquid Display Televisions from The Scope Thereof*. This request alleged that changed circumstances existed in the fact that LCD TVs were a new product differing from CRTs in several respects, principally, in employing different technology and manufacturing processes, in having different physical characteristics, different uses, different marketing strategies, and different distribution channels and pricing.

Plaintiffs request for exclusion from the antidumping order was supported by several retailers of LCD televisions and opposed by a number of unions, namely, the Independent Radionic Workers of America, the International Brotherhood of Electrical Workers, the International Union of Electronic, Electrical, Technical, Salaried and Machinery Workers, AFL-CIO-CLC, and the Industrial Union Department, AFL-CIO. The Commission decided that it was appropriate to institute a review. At the conclusion of that review, the Commission determined that the changed circumstances alleged in the request for modification, namely, that LCD TVs constituted a separate like product from ordinary television receivers, did not in fact exist.

Plaintiffs argue that the Commission, by basing its determination on a review of the existence of changed circumstances, and by not proceeding to determine whether an industry in the United States would be injured in the statutorily defined manner by reason of imports of LCD TVs if the antidumping order were to be modified or revoked, failed to apply the proper legal standard in the review determination. Plaintiffs further argue that the determination was not supported by substantial evidence on the record, because it was made in the face of "overwhelming and un rebutted evidence" that modification of the order to exclude LCD TVs would not cause injury or threat of material injury.

The fundamental issue in this case is whether the Commission is compelled to enter into the question of injury when it undertakes a review or, whether it can revisit one of the premises or findings which set the review process in motion and then make a full blown decision on that premise or finding the determinant of the review. It does not appear that such an issue can arise in the ordinary case in which the premise for granting a review is nothing more than a preliminary form of the proposition which is ultimately to be proved, namely, that the importations under review are no longer likely to cause or threaten injury to a domestic industry. In other words, if the "changed circumstances" which are found sufficient to justify the review arise directly from developments touching on the

injury formerly found and the prospect of future injury, then it would seem anomalous to allow the Commission to avoid going into a complete review of that subject. However, when the rationale for the conduct of the review is the commercial identity of the merchandise for which review is sought and the first question is whether or not the merchandise is a like product, that question is not simply a preliminary form of the ultimate injury question. Two lines of reasoning are possible. If the Commission's first conclusion is irrevocable then it must proceed to a full injury analysis. If, however, the first conclusion is only tentative and only a logical predicate to the conduct of a full review on the subject of injury, then the later elimination of the predicate can dispose of the review.

Plaintiffs argue that there are two distinct phases of the review proceedings, the first in which the Commission finds whether or not changed circumstances justify review, and the second phase in which the Commission must analyze the impact on a U.S. industry of revoking or modifying the order which is under review.

Plaintiffs' basic argument is that the Commission failed to go forward with the injury determination which it was required to make. In support of this argument plaintiffs contend that this was a violation of the statute, a contravention of the Commission's own regulations, and a departure from the Commission own precedent established in previous investigations. Plaintiffs divide the review process into two phases, a first phase in which the requesting party must show "changed circumstances sufficient to warrant a review of such determination." 19 USC § 1675(b)(1); 19 CFR § 207.45(a); and a second phase in which the Commission is charged with determining the impact on a U.S. industry of revoking or modifying the order under review. Plaintiffs stress the Commission's regulations which provide in part that the Commission, in a review investigation, shall determine:

whether an industry in the United States would be materially injured, or would be threatened with material injury, or the establishment of an industry in the United States would be materially retarded, by reason of imports of the merchandise covered by * * * the antidumping order if the order were to be modified or revoked.

19 C.F.R. § 207.45.

Plaintiffs stress that this standard of review and these phases of review have been considered applicable since the inception of reviews by the Commission. They specifically refer to such reviews as *Electric Golf Carts from Poland*, Inv. No. 751-TA-1, USITC Pub. 1069 (1980); *Drycleaning Machinery from the Federal Republic of Germany*, Inv. No. 751-TA-9, USITC Pub. 1617, (1984); *Frozen Concentrate Orange Juice from Brazil*, Inv. No. 751-TA-10, USITC Pub. 1623 (1984); *Salmon Gill Fish Netting of Man-made Fibers from Japan*, Inv. No. 751-TA-11, USITC Pub. 1921 (1986), and *Bicycle Tires*

and Tubes from Taiwan and the Republic of Korea, Inv. Nos. 751§ TA-12 & 13, 52 Fed. Reg. 33, 660 (1987).

Plaintiffs also rely on the well-established body of law that the determination of the ITC Commission cannot be sustained unless the Court is able to discern from the determination that the conclusions have been based on legally sufficient reasoning. *USX Corporation v. United States*, 12 CIT —, (Slip Op. 88-30, March 15, 1988). Plaintiffs also refer to the body of law supporting the proposition that the Court will not allow the ITC to employ an impermissible standard of review. See, for example, *Armstrong Rubber Co. v. United States*, 12 CIT —, Slip Op. 83-33, March 17, 1988).

Finally, plaintiffs rely on the case law which has long held that an agency must follow its own regulations. See, for example, *United States v. Nixon*, 418 U.S. 683, 694-96 (1974). This principal has been applied by this Court in antidumping cases such as *Timken Co. v. United States*, 673 F. Sup. 495 (CIT 1987).

In response to plaintiffs' contentions, the Commission has made a number of arguments, all set against the leitmotif of the deference that must be given to the Commission's exercise of discretion in its area of expertise.

The Commission argues strongly against the idea that the first phase of the review represents an irrevocable decision on the question of changed circumstances and compels the Commission to go on to a full review of the injury question. The Commission places particular emphasis on the plain language of the statute as amended in 1984. The Commission takes the view that under 19 U.S.C. § 1675, plaintiffs continue to hold the burden of persuasion that there are changed circumstances sufficient to warrant modification of the order or exclude LCD TVs from its scope throughout the course of the investigation.

The statutory language and the amendment to it are indeed of great importance. Originally, the language of § 1675 said nothing about the burdens of proof in the proceeding which followed the determination that changed circumstances were sufficient to warrant a review. In that period this Court saw the phases of the review process in somewhat the same light as plaintiffs do now. In other words, the Court sought to give the first phase of the process, namely, the determination that changed circumstances existed, a conclusory effect on the Commission. See, *Matsushita Electric Industrial Co., Ltd. v. United States*, 6 CIT 25, 569 F. Supp. 853 (1983), rev'd. 750 F.2d 927 (Fed. Cir. 1984). In that case this Court opined that once a party had satisfied the Commission in the first phase of the review that changed circumstances existed, that was sufficient to justify a full review and that party did not have a similar burden of proof in the remainder of the investigation, but rather it had only the burden of cooperating with the investigating agency. If the Commission could not establish the need to continue the injury determination then this Court felt that the initial finding of changed

circumstances ought to lead to revocation of the antidumping duty order. Congress rejected this view very quickly, acting to amend the statute even before this Court's opinion was reversed on appeal in 750 F.2d 927, (Fed. Cir. 1984). The statute was specifically amended to indicate a rejection of the reasoning of this Court. The Conference Report to H.R. 3398 explained the 1984 amendment to § 751 as follows:

[The revocation amendment] is intended to clarify the role of the ITC in review investigations under section 751 of the Tariff Act of 1930. In *Matsushita v. United States*, 569 F. Supp. 853 (CIT 1983), the court reviewed a decision of the ITC in *Television Receiving Sets from Japan*, Inv. No. 751-TA-2, USITC Pub. No. 153 (1981). The ITC had found that the domestic television industry would be threatened with material injury if the antidumping order on Japanese televisions were to be revoked. The court held that the ITC's review "failed to establish the continuing need for the injury determination", reasoning that "when the continued necessity for the antidumping duty is placed in question by a change in circumstances, the review required by section 751(b) must either find reason for continuation of the duty or lead to revocation."

The Managers believe that the *Matsushita* decision incorrectly places the burden of persuasion on the domestic industry in section 751 review investigations.

The purpose of section 751 review investigations is to determine whether there are changed circumstances sufficient to warrant revocation of an antidumping order. The ITC must evaluate the changed circumstances alleged to determine whether revocation is appropriate in light of current factor and conditions of trade.

H.R. Rep. No. 1156, 98th Cong., 2d Sess. 182 (1984) (emphasis added).

From this rather specific and definite reaction of Congress and our appellate court it is possible to gather that attempts to give a conclusive and permanently binding effect to the preliminary or "first-phase" determinations of the Commission are not looked on with favor. For this reason it appears indisputable to the Court that the basic issue of changed circumstances remains an open question during the full review. There are additional implications to plaintiffs' argument which make this result desirable. For example, plaintiffs' construction would give a sort of res judicata effect to facts determined in the preliminary phase of the review investigation even though those facts might have been determined primarily on a party's allegations and could not withstand fuller scrutiny.

In addition, there are certain subjects involved in preliminary findings, or implicit in them, which it would be anomalous to give a conclusive effect. For example, a Commission determination as to the composition of a domestic industry producing the like product

pursuant to 19 USC § 1677(4)(A) in a preliminary affirmative determination should not, and does not, bind the Commission to reach the same like product finding in its final determination. *National Pork Producers Council v. United States*, 11 C.I.T. 398, 661 F. Supp. 633 (1987). Similarly, in *Oregon Steel Mills, Inc. v. United States*, 862, F.2d 1541 (Fed. Cir. 1988) our appellate court held that the fact that the ITA had earlier found changed circumstances does not compel it to review the question of dumping when the lack of continued interest by the domestic industry gives it an independent basis for revocation of an outstanding antidumping order. That situation, in which a fundamental premise of the review is found to be missing by the agency, is highly analogous to the situation in this case. It would certainly seem to be a drastic and unjustifiable interference with the legitimate authority of an agency to curtail its power to examine the continued validity of the basic conditions on which its investigation depends.

In light of the relatively clear direction found in the statute, arguments based on the Commission's regulations have little importance. Even if those regulations were in some way to contradict the statutory directive, the Court would have to give primary and controlling weight to the statute. As it is, however, the Court does not find any particular contradictory or inconsistent expressions of authority in the regulations. 19 CFR § 207.45(a)(2) reads as follows, in part:

Upon receipt of information concerning, or upon a request for a review of * * * a determination which resulted in an order issued under the Antidumping Act, 1921, * * * which shows changed circumstances sufficient to warrant a review of such determination, the Commission shall institute an investigation to determine * * * (2) whether an industry in the United States would be materially injured, or would be threatened with material injury, or the establishment of an industry in the United States would be materially retarded, by reason of imports of the merchandise covered by the * * * antidumping order if the order were to be modified or revoked.

19 C.F.R. § 207.45.

The most that can be said about this regulation is that it emphasizes the injury aspect of the review. It cannot be read as precluding the agency from considering and reviewing other fundamental subjects and premises of the review.

For these reasons the Court finds that the Commission was well within its authority to revisit the basic question of whether LCD TVs were, or were not, a product like that being produced by the domestic industry. This moves the focus of the dispute to the Commission's determination that the plaintiffs failed to carry the burden of persuasion that LCD TVs are a different product from the television receivers which were the subject of the 1971 antidumping duty order. It is important to note that in this proceeding plaintiffs

did not allege to the Commission that there were any relevant changed circumstances concerning the effects that the class or kind of merchandise as a whole were having on the domestic industry as to which the Commission made its original determination. This means that the only way in which plaintiffs could obtain an exception from the antidumping order for their assertedly distinctive product was if those products do not belong in the group found to have been injuring the single domestic television receiver industry.

The Commission had previously found no clear dividing line between TV receivers on the basis of screen size or model variations. *Color Television Receivers from the Republic of Korea and Taiwan*, Inv. No. 731-TA-134 (1984). In dealing with the question of like product, the Commission has generally examined the factors which relate to the characteristics and uses of the subject merchandise. This includes physical appearance and uses, customer perception of the articles, common manufacturing facilities and production employees, and channels of distribution. See, for example, *Certain Forged Steel Crank Shafts from the Federal Republic of Germany and the United Kingdom*, Investigation Nos. 731-TA-351 and 353 (Final) USITC Pub. 2014 at 5 (Sept. 1987). The Court considers these factors to be reasonable and justifiable in analyzing the question of like products. See, *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT —, Slip Op. 88-91 (July 14, 1988).

In applying these factors there was substantial evidence in the record that the imported LCD TVs shared certain basic characteristics with all television receivers. These included the possession of a screen tuner, audio device, and electronic circuitry necessary to receive a signal. Secondly, and also of importance, is the fact that there is substantial evidence in the record that there is no distinct difference in use between LCD TVs and cathode ray TVs. The Commission's determination that in the mature television market of the United States, with primary demand being for replacement sets used in secondary positions in the household or in outdoor positions, the use of LCD TVs was likely to be the same as, or similar to, CRT TVs. In addition, the Commission had before it substantial evidence that retailers market and advertise both LCD TVs and CRT TVs together and that the channels of distribution for the LCD TVs do not vary greatly from those of CRT TVs.

Although there are certainly production differences between these types of television receivers, particularly in the production of the display devices, there were nevertheless sufficient grounds for the Commission to find more similarities than differences in general between the production of these two types of televisions. This conclusion is supported by the requirement of all televisions that they have tuners, intermediate frequency amplifiers, audio processing circuitry, color separation circuitry, speakers, a display device, housing, user controls, power source and antennas.

Finally, although plaintiffs have placed great emphasis on the relatively small size of the LCD screen, the Commission was well within its discretion in finding screen size to be an insufficient basis upon which to make the product distinction requested. Furthermore, the Commission was justified in taking into account information that a significant effort was underway by Japanese producers to make LCD TVs with larger screen sizes.

For all these reasons the Court finds that the Commission's determination that LCD TVs did not constitute a different and separate like product from television receivers generally, was supported by substantial evidence. It follows that the basic determination of changed circumstances, originally thought to justify the commencement of a review, did not in fact exist. It further follows that the Commission was justified in not reaching the ultimate issues regarding material injury or threat thereof and consequently these issues are not reached by the Court.

For the reasons given above it is the decision of the Court that plaintiffs' motion for judgment on the administrative record be, and the same hereby is, denied.

(Slip Op. 90-26)

NECO ELECTRICAL PRODUCTS, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-01-00077

MEMORANDUM OPINION AND ORDER

The Customs Service classified certain imported heating pads as "portable electro-thermic kitchen and household appliances," under item 684.20, TSUS. Plaintiff protests this classification, and contends that the merchandise is properly classifiable under item 684.50, TSUS, the "basket" provision for portable electro-thermic kitchen and household appliances. Alternatively, plaintiff contends that the heating pads are properly classifiable as "[e]lectrical articles and electrical parts of articles, not specially provided for," under item 688.45, TSUS.

Held: Plaintiff has failed to rebut the presumption of correctness that attaches to the classification by Customs. Accordingly, the imported merchandise was properly classified under item 684.20, TSUS.

[Judgment for defendant; action dismissed.]

(Dated March 19, 1990)

Baker & McKenzie, (William D. Outman, II), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (Barbara M. Epstein), for defendant.

Re, Chief Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of merchandise imported from Mexico and described on the customs invoice as "heating pads." The merchandise entered at the port of Brownsville, Texas.

The merchandise was classified by the Customs Service as "[t]oasters, waffle irons, skillets, ovens, stoves, coffee makers and other portable electro-thermic kitchen and household appliances," under item 684.20 of the Tariff Schedules of the United States (TSUS). Consequently, duty was assessed at the rates of 8.1 per centum or 7.7 per centum *ad valorem*, depending upon the year of entry.

Plaintiff protests this classification and contends that the merchandise is properly classifiable under item 684.50, TSUS, which is now codified at item 684.48, TSUS, the "basket" provision for electro-thermic kitchen and household appliances, dutiable at a rate of 5.3 per centum or 5.1 per centum *ad valorem*, depending upon the year of entry. Alternatively, plaintiff claims that the merchandise is classifiable as "[e]lectrical articles and electrical parts of articles, not specially provided for," under item 688.45, TSUS, which is now codified at item 688.42, TSUS, dutiable at a rate of 5.3 per centum or 5.1 per centum *ad valorem*, depending upon the year of entry.

The pertinent statutory provisions of the tariff schedules are as follows:

Classified under:

Schedule 6, Part 5:

Electric instantaneous or storage water heaters and immersion heaters; electric soil heating apparatus, and electric space heating apparatus; electric hair dryers, hair curlers, and other electric hair dressing appliances; electric flatirons; *electro-thermic kitchen and household appliances*; electric heating resistors other than those of carbon; all the foregoing and parts thereof:

	*	*	*	*	*	*	*
Item 684.20	Toasters, waffle irons, skillets, ovens, stoves, coffee makers and other <i>portable electro-thermic kitchen and household appliances</i> 8.1% <i>ad val.</i> (1980)						
 7.7% <i>ad val.</i> (1981)						
	(emphasis added)						

Claimed under:

Other:

Item 684.50	Other	5.3% <i>ad val.</i> (1980)
		5.1% <i>ad val.</i> (1981)

Alternatively Claimed Under:

Schedule 6, Part 5:

Electrical articles and electrical parts of articles, not specially provided for:

Item 688.45	Other	5.3% <i>ad val.</i> (1980)
		5.1% <i>ad val.</i> (1981)

The question presented is whether the imported heating pads have been properly classified as "portable electro-thermic kitchen and household appliances," under item 684.20, TSUS, as classified by Customs, or whether they are properly classifiable under item 684.50, TSUS, the "basket" provision for portable electro-thermic kitchen and household appliances, as claimed by plaintiff. Alternatively, plaintiff contends that, if the heating pads are not to be classified under the 'basket' provision, they are classifiable as "[e]lectrical articles and electrical parts of articles, not specially provided for," under item 688.45, TSUS.

The parties have stipulated the essential facts, and have submitted the case for decision in lieu of trial.

In order to decide the question presented, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984).

After a careful examination of the merchandise, the stipulated facts and supporting papers, the pertinent tariff provisions and case law, it is the determination of the court that plaintiff has not overcome the presumption of correctness that attaches to the classification by Customs. See 28 U.S.C. § 2639(a)(1) (1982); *Jarvis Clark Co.*, 733 F.2d at 878. Since the court holds that Customs has correctly classified the imported merchandise under item 684.20, TSUS, the classification is sustained and the action dismissed.

BACKGROUND

The imported articles consist of various styles of heating pads. As indicated by the stipulated facts, "[a] heating pad is a portable thermal electric appliance * * *." Hence, it is clear at the outset that the imported merchandise consists of portable electro-thermic appliances. It is significant that it is stipulated that the heating pads are most frequently used in the household, although the parties acknowledge that they are also used in hospitals and elsewhere.

The heating pads at issue in this case are typically used "under, around or atop a portion of the human anatomy." The heating pads are intended "to ease body discomfort caused by muscle strain and to help relieve comparable human physiological disfunctions."

The heating pads have an appliance cord which connects to an electric outlet, and a control switch which permits the user to select from a number of heat settings. The parties also agree that "[t]he heating pads, while relying on electrical elements to generate heat, also contain thermostats and other comparable mechanisms to insure that heat does not generate to the point that it would burn the user."

In support of its contention that the Customs Service erroneously classified the heating pads, plaintiff relies on two principal arguments. Primarily, plaintiff contends that paragraphs 339 and 353 of

the Tariff Act of 1930, which are the predecessor provisions of the tariff items in issue, indicate that the proper classification of the merchandise should be under item 684.50, TSUS. Secondly, plaintiff maintains that the imported merchandise is not *ejusdem generis* with the exemplars or articles specifically mentioned in item 684.20, TSUS. See, e.g., *Nomura (Am.) Corp. v. United States*, 62 Cust. Ct. 524, 529-32, C.D. 3820, 299 F. Supp. 535, 540-42 (1969), *aff'd*, 58 CCPA 82, C.A.D. 1007, 435 F.2d 1319 (1971).

In support of the classification by Customs, defendant contends that the heating pads are embraced by the designation for "portable electro-thermic kitchen and household appliances," in item 684.20, TSUS, and that they are within the common meaning of the terms "portable electro-thermic household appliances." Hence, the defendant submits that plaintiff has "plainly failed to rebut the Government's presumptively correct determination that the heating pad is correctly classified under item 684.20, TSUS, which expressly provides for portable electro-thermic household appliances."

DISCUSSION

As with other statutory provisions, it is function of the court to interpret the tariff acts in a manner that will fulfill or carry out the intent of Congress. See *Sandoz Chem. Works, Inc. v. United States*, 43 CCPA 152, 156, C.A.D. 623 (1956). The primary source to ascertain that intent "is the specific language of the tariff provision, which is to be given its common or commercial meaning." *Phone-Mate, Inc. v. United States*, 12 CIT —, 690 F. Supp. 1048, 1051 (1988) (citing *Ameliotex, Inc. v. United States*, 65 CCPA 22, 25, C.A.D. 1200, 565 F.2d 674, 677 (1977)), *aff'd*, 867 F.2d 1404 (Fed. Cir. 1989). See also *A & A Int'l, Inc. v. United States*, 11 CIT 775, 778, 676 F. Supp. 263, 265 (1987).

The court may ascertain and determine the common meaning of tariff terms by referring to dictionaries, scientific authorities, and other reliable sources. See *Schott Optical Glass, Inc. v. United States*, 82 Cust. Ct. 11, 16, C.D. 4783, 468 F. Supp. 1318, 1321, *aff'd*, 67 CCPA 32, C.A.D. 1239, 612 F.2d 1283 (1979). When the court is confronted with conflicting interpretations of a tariff provision, and there is doubt or ambiguity, it is proper to resort to legislative history and other appropriate extrinsic guides. See 2A N. Singer, *Sutherland Statutory Construction* § 48.01 (4th ed. 1984). In all cases, absent a contrary legislative intent, the statutory language is deemed conclusive. See *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). Indeed, when the court finds "the terms of a statute unambiguous, judicial inquiry is complete * * *." *Rubin v. United States*, 449 U.S. 424, 430 (1981).

The term "electrothermic" is defined in *Webster's Third New International Dictionary* 733 (1963), as "relating to both electricity and heat: combining electricity and heat * * * : *specif*: relating to the generation of heat by electricity * * *." In addition, in *Border Bro-*

herage Co. v. United States, 65 Cust. Ct. 106, 112, C.D. 4061 (1970), the Customs Court stated that "[t]he word 'thermic' relates to heat and electro-thermic connotes heat which has as its source electricity."

In this case, it cannot be disputed that the heating pad operates by electrically generated heat. Indeed, the stipulation of facts expressly describes the heating pad as "a portable thermal electric appliance that utilizes the property of alternating electric current to develop heat when it encounters resistance." (emphasis added).

Webster's Third New International Dictionary states that an "appliance" is "a tool, instrument, or device specially designed for a particular use: * * * a household or office utensil, apparatus, instrument, or machine that utilizes a power supply, esp. electric current * * *." *Id.* at 104-05. It also cannot be questioned that "portable" means "capable of being carried: easily or conveniently transported: light or manageable enough to be readily moved * * *." *Id.* at 1768. Indeed, the *IEEE Standard Dictionary of Electrical and Electronic Terms* 30 (2d ed. 1977) defines a "portable appliance" as "[a]n appliance that is actually moved or can easily be moved from one place to another in normal use."

The stipulation of facts states that the "heating pads are used to ease body discomfort caused by muscle strain and to help relieve comparable human physiological disfunctions." A physical examination of the heating pads reveals that they fully comply with the definition, in that they are light and may be "easily and conveniently transported."

The term "household" is defined by *Funk and Wagnalls New Standard Dictionary of the English Language* 1190 (1956) as "[b]elonging to the house and family; domestic; as, household goods." (emphasis in original). In the *Electrical Engineers Handbook*, under the heading "Household Heating and Cooking Appliances," a number of articles are listed, including a "warming pad." See H. Pender & W. Del Mar, *Electrical Engineers Handbook* 15-73 (4th ed. 1953). Under "warming pad," it is stated that: "Warming Pads are of two types. One type, termed 'three-speed' is set for 'low,' 'medium,' or 'high' by a switch, which changes the circuit for inputs of 20, 40, or 60 watts respectively. Thermostats limit the top temperature. 'Multiple-heat' pads give positive control at different temperatures." *Id.* at 15-74. The stipulation of facts states that the heating pads contain:

[a] control that permits the user to turn the heating pad on and off and to select from among a number of heat settings (e.g., high, medium and low). The heating pads, while relying on electrical elements to generate heat, also contain thermostats and other comparable mechanisms to insure that heat does not generate to the point that it would burn the user.

From a reading of the definitions and the stipulation of facts, it is clear that "warming pad" is synonymous with "heating pad."

It is also expressly stipulated that "[a]pproximately ninety-five percent * * * of all heating pads sales are to individuals * * * [and that] [t]he greatest use of the heating pad is in the household * * *." (emphasis added). In sum, contrary to the assertions of plaintiff, the stipulated facts and the quoted definitions indicate that the imported heating pads are within the common meaning of "portable electro-thermic household appliances."

In a supplement to its reply brief, plaintiff notes that a narrower interpretation of item 684.20, TSUS, is supported by the decision of this court in *West Bend Co., Div. of Dart Indus., Inc. v. United States*, 12 CIT —, 703 F. Supp. 93 (1988). In *West Bend*, the imported merchandise consisted of electric hot-air popcorn poppers that was classified by the Customs Service "as a portable electro-thermic appliance under Item 684.20 of the [TSUS] * * *." 703 F. Supp. at 94. The plaintiff protested the classification, and contended that the imported popcorn poppers were properly classifiable as electro-mechanical household appliances, under item 683.32, TSUS, or, alternatively, "as other electric articles not specially provided for under Item 688.42, [TSUS] * * *." *Id.*

In *West Bend*, the court found that the imported popcorn poppers contained both "an electro-thermic element which is essential to the popping of the corn and an electro-mechanical element which is also essential to the process." *Id.* at 95. Having concluded that the imported popcorn poppers were "a hybrid object which cannot properly be classified either under an electro-thermic classification or under an electro-mechanical classification," the court held that the popcorn poppers were properly classifiable as portable electro-thermic appliances under item 688.42, TSUS. *Id.* Of particular relevance to the case at bar is the conclusion of the court "that the provision for electro-thermic appliances is not a description by name." *Id.* at 95. Hence, the court concluded that "the basic principle that tariff acts were enacted to include all forms of *named* articles does not apply here." *Id.* (emphasis in original).

Plaintiff contends that the quoted language from *West Bend* rebuts the arguments in defendant's brief. In its supplement to its reply brief, plaintiff asserts that "[t]he Brief for the * * * Defendant, relies in part on the premise that the provision for 'electro-thermic * * * appliances' found in item 684.20, [TSUS], is a description by name and therefore includes all forms of the named article."

Subsequent to plaintiff's supplement to its reply brief, however, the decision of this court in *West Bend* was reversed. See *West Bend Co., Div. of Dart Indus., Inc. v. United States*, 892 F.2d 69 (Fed. Cir. 1989). In reversing, the Court of Appeals for the Federal Circuit determined "that the narrow scope the trial court gave the term 'electrothermic * * * appliances' was legally incorrect." 892 F.2d at 72. The appellate court stated that:

When TSUS item 684.20 is read in conjunction with other relevant tariff provisions and when consideration is given to other indicators of legislative intent * * *, it is apparent that the term "electrothermic * * * appliances," as used in TSUS item 684.20 and its superior heading, was intended to encompass merchandise having both electrothermic and electromechanical components."

Id. Hence, the appellate court opinion in *West Bend* supports a broader interpretation of the designation "portable electro-thermic kitchen and household appliances," in item 684.20, TSUS than the one urged by the plaintiff.

Nevertheless, plaintiff contends that Congress intended to exclude classification of heating pads under item 684.20, TSUS, and notes that, according to the *Tariff Classification Study of 1960*, paragraph 339 of the Tariff Act of 1930 is the predecessor provision to item 684.20, TSUS. Plaintiff also notes that paragraph 353 of the Act is the predecessor provision to item 684.50, TSUS. See United States Tariff Commission, *Tariff Classification Study: Proposed Revised Tariff Schedules of the United States* 744-45 (1960).

Specifically, plaintiff asserts that paragraph 339 of the Tariff Act of 1930, the predecessor provision of item 684.20, TSUS, "was concerned only with utensils made of metal and characterized as table, household, kitchen or hospital utensils * * *." Plaintiff submits that, while paragraph 339 may have covered articles having a heating element, the presence of a heating element was not necessary for an article to have been classifiable under that paragraph. Hence, according to plaintiff, "[t]he key condition for classification under paragraph 339 was that the article had to be a utensil."

Plaintiff submits that, in contrast, the predecessor provision of item 684.50, TSUS, paragraph 353 of the Act, "focus[ed] on merchandise having an electrical device or element as an essential part." Hence, plaintiff states: "Since the essential design element of a heating pad is the electrical heating element, and not the particular metallic composition, we submit that heating pads would have been properly classifiable under paragraph 353 of the Act, and not under paragraph 339, prior to the adoption of the TSUS." On these assumptions and assertions, plaintiff maintains that the congressional intent in enacting the TSUS would be violated if an article that formerly would have been classifiable under paragraph 353 of the Act, the predecessor of item 684.50, TSUS, is now classified under item 684.20 of the tariff schedules.

Plaintiff also contends that a heating pad could not be a "utensil" under paragraph 339 of the Tariff Act of 1930, and, in support of its argument, cites the narrower construction of the term "utensil" found in the dissenting opinion of Judge Martin, of the Court of Customs and Patent Appeals, in *J.C. DeJong & Co. v. United States*, 50 Cust. Ct. 90, C.D. 2395 (1963), *rev'd*, 52 CCPA 26, C.A.D. 852 (1965).

The question presented in *DeJong* was whether certain pole ends used on the ends of curtain rods had been properly classified by the Customs Service "as articles in chief value of brass, not specially provided for, in paragraph 397 of the Tariff Act of 1930. * * *." 50 Cust. Ct. at 90. The plaintiff contended that the imported merchandise was properly classifiable "as household utensils, not specially provided for, in chief value of brass in paragraph 339 * * *." *Id.* The defendant maintained that the imported merchandise was not a household utensil within the common meaning of that term.

The Customs Court held that the pole ends were not utensils or implements within the definition of those words, and stated that "it would seem to follow * * * that the pole ends would constitute parts [of the curtain rod]." *Id.* at 93. The court reasoned that "where pole ends are used with curtain poles for suspending therefrom curtains affixed to pole rings, said pole ends are integral, constituent, and component parts of the curtain pole with which they are joined, and said pole could not serve its function without the use of the pole ends." *Id.*

On appeal, the Court of Customs and Patent Appeals reversed, and held that since "the pole ends are chiefly used in the household" and "serve primarily a utilitarian purpose," they should be classified as household utensils. 52 CCPA at 29. The appellate court reasoned that a utensil is "'something that is used; a thing serving a useful purpose.'" *Id.* at 28. Hence, the court concluded that "[s]ince we find that the pole ends themselves are household utensils, it is unnecessary to review the Customs Court's consideration of them as parts of poles." *Id.* at 29.

In his dissenting opinion in *DeJong*, Judge Martin disagreed with the appellate court's broad definition of "utensil," and commented that:

I think the common meaning of the term "utensil" connotes a tool function as well as a utility function in an article. The tool aspect to my mind is essential, while the decisions cited by the majority emphasize the utilitarian aspect in broadly applying the definitions to the articles with which they were concerned. An over-emphasis of the utilitarian aspect can lead to an unrealistic result, as this case shows. A chair is useful but it is hardly a tool or utensil; the same is true of a curtain pole end.

Id. at 30 (Martin, J., dissenting). Relying on the quoted language, plaintiff contends that "the term 'utensil' expresses a range of functions, none of which accords with those of a heating pad."

Although Judge Martin's dissenting opinion in *DeJong* did not consider the curtain pole ends to have had a "tool aspect," that dissenting view does not state the holding of the case, nor does it represent the law. Hence, subsequent to *DeJong*, the term "utensil" has been given a broad definition. See e.g., *New York Merchandise Co. v. United States*, 62 Cust. Ct. 674, 677, C.D. 3847 (1969) (a "uten-

sil" is "'something that is used; a thing serving a useful purpose'" (quoting *DeJong*, 52 CCPA at 28); see also *The Akron v. United States*, 60 Cust. Ct. 60, 63, C.D. 3259 (1968).

Plaintiff also relies on the appellate court opinion in *Pramette Juvenile Furniture Co. v. United States*, 20 Cust. Ct. 192, C.D. 1109 (1948), *aff'd*, 36 CCPA 61, C.A.D. 398 (1949), and cites the case for the proposition that heating pads cannot be considered household utensils because they are not "used in the household for the care and maintenance of the home."

The question presented in *Pramette* was whether certain children's strollers or go-carts had been properly classified by the Customs Service "as articles of metal, not specially provided for, under paragraph 397 of the Tariff Act of 1930 * * *," 20 Cust. Ct. at 192. The plaintiff, in seeking classification of the strollers as household utensils under paragraph 339, reasoned that:

The word "house" [indicates] a structure for shelter and the word "household" * * * carries with it the broader connotation of pertaining to the members of a family, and since the articles here in issue are used for the convenience and comfort of the members of a family, they are household utensils and within the purview of paragraph 339 * * *.

Id. at 193.

The Customs Court held that the strollers or go-carts did "not come within the scope of the term 'household utensils' as commonly defined and as judicially interpreted." *Id.* at 196. The Court stated that:

[w]hile recognizing the distinction drawn by plaintiff's counsel between the words "house" and "household," nevertheless the word "household," as used in paragraph [] 339 * * *, appears as an adjective to modify the noun [] "utensils" * * *. Reference to lexicographic authorities * * * has indicated a clear distinction in meaning between these latter two words. Moreover, our attention has not been drawn to any case wherein articles similar to those here in issue have been held to be *household utensils* within the purview of paragraph 339 * * *.

Id. (emphasis in original).

In affirming the decision of the Customs Court, the Court of Customs and Patent Appeals stated that "[t]he words 'household utensils' as used in paragraph 339 * * * have been consistently construed by this court to refer to articles which serve a utilitarian purpose and are chiefly used in the household for the care and maintenance of the home for the convenience and comfort of its members." 36 CCPA at 64. Hence, the appellate court held that the imported strollers and go-carts were not household utensils because "[t]he stipulation in this case clearly states that the strollers or go-carts 'are designed for and used principally * * * for the transporta-

tion of children * * * and are chiefly so used on streets and beaches.' " *Id* at 63 (emphasis in original).

Relying on the *Pramette* case, plaintiff argues that heating pads are not "household utensils" because they are not "used in the household for the care and maintenance of the home." In *Pramette*, however, the Court of Customs and Patent Appeals did not limit "household utensils" to those used *only* "for the care and maintenance of the home." Instead, the court in *Pramette* stated that "[t]he words 'household utensils' * * * have been consistently construed by this court to refer to articles which serve a utilitarian purpose and are chiefly used in the household for the care and maintenance of the home for the convenience and comfort of its members." 36 CCPA at 64 (emphasis added). It is also relevant to note that the *Pramette* case turned on the fact that the strollers and gocarts were not used chiefly in the home, but on streets and beaches.

In this case, in the language of the stipulation, "[t]he greatest use of heating pads is in the household * * *." Moreover, it cannot be doubted that when the heating pads are "used to ease body discomfort caused by muscle strain and to help relieve comparable human physiological disfunctions[,] they "serve a utilitarian purpose," and are being used "for the convenience and comfort of [the household's] members." See *Pramette*, 36 CCPA at 64.

Moreover, notwithstanding plaintiff's contention that item 684.20, TSUS, is merely a reenactment of paragraph 339 of the Act, the language and structure of paragraph 339 is not controlling in the interpretation and application of item 684.20 of the tariff schedules. It is well established that judicial interpretation under a prior tariff act is not controlling when the tariff schedules differ in structure and wording from the Tariff Act. See *Brentwood Originals v. United States*, 73 Cust. Ct. 185, 186, C.D. 4572 (1974). The wording of paragraph 339 is as follows:

Table, household, kitchen, and hospital utensils, and hollow or flat ware, not specially provided for: * * * whether or not containing electrical heating elements as constituent parts thereof.

This language is quite different from "toasters, waffle irons, skillets, ovens, stoves, coffee makers and other portable electro-thermic kitchen and household appliances" as provided for in item 684.20, TSUS. Hence, classification under item 684.20 of the tariff schedules is not controlled by paragraph 339 of the Tariff Act of 1930.

Plaintiff also contends that the classification of the heating pads under item 684.20, TSUS, does violence to the principle or canon of *ejusdem generis*. According to plaintiff, "heating pads are not *ejusdem generis* with the exemplars specified in item 684.20, TSUS." Plaintiff submits that all the articles or exemplars listed in item 684.20, TSUS, "are used in the preparation of food or beverages intended for human consumption," and that, in contrast, the heating

pads are "therapeutical devices" and "play no part in the kitchen." Hence, plaintiff concludes that, "it would be an improper and unnecessary stretch of the rules of statutory construction to hold that the phrase 'other portable electrothermic household and kitchen appliances' as used in item 684.20, TSUS, includes therapeutic devices such as heating pads."

The defendant responds that *ejusdem generis* is not to be invoked in this case because "the legislature has plainly and unambiguously provided for portable electro-thermic household appliances in TSUS item 684.20, and since a heating pad is a portable electro-thermic household appliance within the common meaning of those terms, the application of a rule of construction to determine whether the provision encompasses the article it describes, is unwarranted."

Ejusdem generis, which means of the same class or kind, teaches that "where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described." *United States v. Damrak Trading Co.*, 43 CCPA 77, 79, C.A.D. 611 (1956). *Ejusdem generis* is "a specific application or illustration of the broader maxim *noscitur a sociis*, i.e., known by its associates." *Economy Cover Corp. v. United States*, 76 Cust. Ct. 130, 132, C.D. 4645, 411 F. Supp. 783, 784 (1976). It is well established, however, that *ejusdem generis* is not to be invoked to restrict or limit the clear language of a tariff provision. See *Sandoz Chem. Works, Inc. v. United States*, 50 CCPA 31, 35, C.A.D. 815 (1963). As with all principles or canons of statutory interpretation, *ejusdem generis* is "used only as an instrumentality for determining the legislative intent in cases where it is in doubt." *John V. Carr & Son, Inc. v. United States*, 77 Cust. Ct. 103, 108, C.D. 4679 (1976).

Plaintiff relies on the case of *Daw Indus., Inc. v. United States*, 5 CIT 12, 561 F. Supp. 433 (1983), *rev'd*, 714 F.2d 1140 (Fed. Cir. 1983), for the application of *ejusdem generis* to item 684.20, TSUS.

In *Daw*, the question presented was whether certain prosthetic sheaths and socks designed to be used by amputees wearing artificial limbs had been properly classified by the Customs Service as "wearing apparel," under item 382.78, TSUS, for the sheaths, and under item 382.58, TSUS, for the socks. The plaintiff contested the classification, and claimed that the sheaths and socks should have been classified under item 709.57, TSUS, which provides for "[o]rthopedic appliances, surgical belts, trusses, and similar articles; artificial limbs, eyes, teeth, and other prosthetic articles; splints and other fracture appliances." See 5 CIT at 13, 561 F. Supp. at 434.

More specifically, the plaintiff in *Daw* claimed that the merchandise was "other prosthetic articles" in the sense that they were themselves prostheses or, in the alternative, that they were prosthetic articles. See 5 CIT at 20, 561 F. Supp. at 439. The defendant, on the other hand, claimed that "the socks and sheaths are not prostheses and the provision for prosthetic articles encompasses on-

ly those [articles] which are prostheses." *Id.* Applying the principle of *ejusdem generis*, this court held that the sheaths and socks were "not of the same class or kind as the enumerated articles [in item 709.57] which are replacements for missing or defective parts [of the body] * * *." *Id.* at 22, 561 F. Supp. at 440. Hence, the court held that the sheaths and socks were more in the nature of wearing apparel, and sustained the classification. *Id.*

In reversing the decision, the Court of Appeals for the Federal Circuit held that "'other prosthetic articles' has a broader meaning than the C.I.T. gave it." 714 F.2d at 1142. The appellate court stated that its "lodestar is congressional intent and, in the absence of a specific definition we begin with common meaning." *Id.* In determining that the sheaths and socks were within the common meaning of the term "other prosthetic articles" in item 709.57, TSUS, the appellate court did not apply *ejusdem generis*. Hence, under the principles enunciated by the appellate court in *Daw*, merchandise which falls within the common meaning of a term or terms used in a tariff schedule is properly classified under that provision, absent a specific contrary congressional intent.

In this case, plaintiff has failed to demonstrate a legislative intent contrary to the common meaning of "portable electro-thermic kitchen and household appliances." Furthermore, there is no ambiguity as to the meaning of the words "portable electro-thermic kitchen and household appliances," as they are used in item 684.20, TSUS. Since the heating pads are encompassed by the common meaning of the tariff provision, plaintiff may not resort to *ejusdem generis* to restrict the scope of tariff item 684.20.

Finally, plaintiff alternatively claims that the heating pads "must be classifiable under the broader provisions of item 688.4[5], TSUS as other electrical articles not specifically provided for." The only reason given for this contention is that "[i]t follows that if the more specific provision of item 684.[50], TSUS does not apply, then the basket provision encompassing the heating pads is the only other choice for classifying heating pads."

The Court of Customs and Patent Appeals, however, has noted that "[o]ne of the purposes of the TSUS, insofar as schedule 6 is concerned, was to reduce the importance of the basket provisions of the Tariff Act of 1930." *Hawaiian Motor Co. v. United States*, 67 CCPA 42, 46, C.A.D. 1241, 617 F.2d 286, 289 (1980). In addition, "to the extent practicable, the Tariff Commission's goal [was] to particularize, whenever possible, the various lines of imported merchandise." *C.J. Tower & Sons, Inc. v. United States*, 63 Cust. Ct. 128, 139, C.D. 3886 (1969). Consequently, plaintiff's alternative claim, that the heating pads should be classified under the basket provision, would, if accepted by the court, frustrate the desired goal.

CONCLUSION

Based upon an examination of the imported heating pads, the stipulated facts and the applicable statutory and judicial authority, it is the holding of the court that the plaintiff has not rebutted the presumption of correctness that attaches to the classification by Customs.

Since the imported merchandise was properly classified under item 684.20, TSUS, plaintiff's protest is denied and the action is dismissed. Judgment will issue accordingly.

(Slip Op. 90-27)

FORMER EMPLOYEES OF LINDEN APPAREL CORP., PLAINTIFFS V.
UNITED STATES, DEFENDANT

Court No. 87-04-00625

[Judgment for defendant.]

(Decided March 19, 1990)

Bobby A. McGee for plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrensis*) for defendant.

OPINION

TSOUICALAS, *Judge*: This matter is before the Court following remand. Plaintiffs continue to challenge a decision of the Secretary of Labor denying them certification to apply for trade adjustment assistance benefits under the Trade Act of 1974, Pub. L. 93-618, title II (codified as amended at 19 U.S.C. §§ 2271-2321, 2395 (1988)). Section 222 of the Act requires the Secretary to certify workers if he determines

(1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,

(2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and

(3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a) (1988).

BACKGROUND

Linden Apparel ceased production of men's and boys' overalls in 1985, and of painter pants in May 1986, at which time 75 percent of its workers were separated from their positions. During the ensuing six months, the remaining workers were separated intermittently until the plant's closure in November 1986.

On November 21, 1986, plaintiffs filed a petition for certification to apply for trade adjustment assistance benefits with the Department of Labor claiming that their separations were caused by competition from imports from Haiti and elsewhere. The Secretary of Labor, in denying the petition, determined that Linden Apparel was an exclusive contractor for its parent company, Washington Manufacturing, and treated Washington Manufacturing as Linden Apparel's sole customer for purposes of the investigation. Since Washington Manufacturing did not use foreign contractors or import men's and boys' overalls and painter pants in 1985 and 1986, the period in question, the Secretary reasoned that criterion (3) of Section 222 was not satisfied in that "increases of imports of articles like or directly competitive with articles produced by" Linden Apparel did not contribute importantly to the workers' separations. 19 U.S.C. § 2272(a)(3).

Plaintiffs sought judicial review of the negative determination in this Court pursuant to 19 U.S.C. § 2395(a) (1988). In remanding the case to the Secretary, the Court held that the Secretary erred in treating Washington Manufacturing as Linden Apparel's sole customer, and ordered the Secretary to survey unrelated purchasers of the articles under investigation. *Former Employees of Linden Apparel Corp. v. United States*, 13 CIT —, Slip Op. 89-79 (June 6, 1989). Only then could the Secretary accurately determine whether purchasers of men's and boys' overalls and painter pants were switching from those made by Linden Apparel to imports, and whether any such increase in imports "contributed importantly" to the workers' separations.¹

Further, the Court ordered the Secretary to provide a "description of the organizational structure" of Washington Industries, the parent company of Washington Manufacturing, and of how Linden Apparel fit into the organization. *Id.* at 7. In particular, the Court noted the need to determine whether Washington Industries' corporate ties with Haywood Male, Inc. ("Haywood") have a bearing on the certification issue.

DISCUSSION

The Court of International Trade may review the Secretary's denial of certification to assure that the determination is "supported by substantial evidence contained in the administrative record and

¹The Court stated that it would be circular reasoning for the Secretary to treat the parent company as its subsidiary's sole customer since that would not be helpful in determining whether purchasers of goods made by the subsidiary switched to imports, and whether increases of such imports contributed importantly to the workers' separations.

is in accordance with law." *Nagy v. Donovan*, 6 CIT 141, 143, 571 F. Supp. 1261, 1263 (1983) (citing 19 U.S.C. § 2395(b)); *Woodrum v. Donovan*, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd*, 737 F.2d 1575 (Fed. Cir. 1984). When the court remands a case, the Secretary must make "new or modified findings of fact" which also must be supported by substantial evidence. 19 U.S.C. § 2395(b) (1988).

In accordance with the Court's order, the Secretary conducted surveys of unrelated purchasers of Linden Apparel's painter pants. The use of such surveys has been sanctioned by the courts as a means of determining whether a "causal nexus" exists between increased imports and lost sales resulting in separations. *Estate of Finkel v. Donovan*, 9 CIT 374, 381, 614 F. Supp. 1245, 1250 (1985). The Secretary conducted a number of customer surveys and each purchaser indicated it had not imported painter pants during the applicable period. *Notice of Negative Determination on Reconsideration in Supplemental Administrative Record (Public)* at 54. Some of the purchasers indicated that painter pants were a "fad" which ended by 1986, after which they simply did not reorder the product. *Id.*

Trade adjustment assistance was not intended to compensate workers who were separated for reasons other than increases in imports. The legislative history of the Trade Act of 1974 makes clear that separations which result from cyclical factors are not covered by the statute. S. Rep. No. 1298, 93d Cong., 2d Sess. 133, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7275. It is an economic reality that when the consumer demand for a product decreases, sales of that product decline and worker separations may result. While increases in imports may be a contributing factor to the decreased demand, the Trade Act was not meant to afford trade adjustment assistance "to all workers who lose their jobs due in some way to imports." *Western Conference of Teamsters v. Brock*, 13 CIT —, —, 709 F. Supp. 1159, 1170 (1989), quoting *Former Employees of Asarco's Amarillo Copper Refinery v. United States*, 11 CIT 815, 819, 675 F. Supp. 647, 650 (1987). The statute requires the increased imports to have "contributed importantly" to the separations and to a "decline in sales or production." 19 U.S.C. § 2272(a)(3). In order for imports to have contributed importantly to the worker separations, they must be "significantly more than [a] *de minimus*" cause. *Finkel*, 9 CIT at 382, 614 F. Supp. at 1251 (quoting *Cherlin v. Donovan*, 7 CIT 158, 163, 585 F. Supp. 644, 648 (1984)).

On remand, the Secretary determined from customer surveys that none of Washington Manufacturing's customers imported painter pants during the applicable period. *Notice of Negative Determination on Reconsideration in Supplemental Administrative Record (Public)* at 54. Since the decline in sales of painter pants apparently was due to the end of a "fad," the Secretary found that im-

ports could not have contributed importantly to the separations. *Id.* The Court holds that this determination is supported by substantial evidence and in accordance with law.

The Court also ordered the Secretary to investigate the corporate structure of Washington Industries and how it might affect the certification issue. Plaintiffs claim that Washington Industries was purchased by Haywood in 1985 or 1986 and that Haywood had a plant in Haiti to which Washington Industries transferred its operations, resulting in the separations. *Plaintiffs' Letter Complaint in Administrative Record (Public)* at 40-41.

The Secretary's investigation revealed that Haywood's parent company, BNHH Properties ("BNHH") purchased Washington Industries, parent of Washington Manufacturing and Linden Apparel, in October 1986, several months after the Linden plant ceased production of painter pants. *Notice of Negative Determination on Reconsideration in Supplemental Administrative Record (Public)* at 55. It also disclosed that Washington Industries and Haywood were merged in early 1987.² But, since Washington Industries did not have corporate ties with Haywood during the time Linden Apparel was going out of business, the Secretary concluded that Washington could not have transferred its operations there during the relevant period. Moreover, the Haitian plant did not make products "like or directly competitive with" painter pants; it produced men's jackets and western shirts. This rebuts plaintiffs' charge that the Haitian plant's production contributed to the separations. These facts sufficiently substantiate the Secretary's determination.

CONCLUSION

The Court is convinced that the Secretary's determination is supported by substantial evidence and is in conformity with the law. Accordingly, the negative determination of the Secretary of Labor is affirmed and plaintiffs' action is dismissed.

²The Secretary's investigation was based on communications with company officials as well as corporate and state documents relating to the acquisition of Washington by BNHH in October 1986 and the merger of Washington and Haywood in 1987. *Supplemental Administrative Record (Public)* at 25-36.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C80/77 3/9/80 DiCarlo, J.	Minolta Corp.	83-9-01334	408.12 10% 408.84 Various rates	405.20 16.5%, 18.1%, or 19.7%	Tomogawa U.S.A., Inc. v. U.S., S.O. 88-17 (1988)	Los Angeles Developer, etc.
C80/78 3/9/80 Aquilino, J.	Rhone Poulenc, Inc.	83-12-01742	407.16 1.7c per lb. + 13.6%	402.72 Various rates	Standard Chlorine Chemical Co. v. U.S., S.O. 88-31 (1989)	Philadelphia Trichloroethane, technical grade, etc.
C80/79 3/9/80 Aquilino, J.	Standard Chlorine Chemical Co.	83-12-01741	407.16 1.7c per lb. + 13.6%	402.72 Various rates	Standard Chlorine Chemical Co. v. U.S., S.O. 88-31 (1989)	Philadelphia Trichloroethane, technical grade, etc.
C80/80 3/5/80 Aquilino, J.	Standard Chlorine Chemical Co.	85-2-00289	407.16 1.7c per lb. + 13.6%	402.72 Various rates	Standard Chlorine Chemical Co. v. U.S., S.O. 88-31 (1989)	Philadelphia Trichloroethane, technical grade, etc.
C80/81 3/9/80 Aquilino, J.	Standard Chlorine Chemical Co.	85-11-01602	407.16 1.7c per lb. + 13.6%	402.72 Various rates	Standard Chlorine Chemical Co. v. U.S., S.O. 88-31 (1989)	Philadelphia Trichloroethane, technical grade, etc.
C80/82 3/9/80 Aquilino, J.	Standard Chlorine Chemical Co.	86-3-00315	407.16 1.7c per lb. + 13.6%	402.72 Various rates	Standard Chlorine Chemical Co. v. U.S., S.O. 88-31 (1989)	Philadelphia Trichloroethane, technical grade, etc.
C80/83 3/9/80 Aquilino, J.	Standard Chlorine Chemical Co.	88-6-00411	407.16 1.7c per lb. + 13.6%	402.72 Various rates	Standard Chlorine Chemical Co. v. U.S., S.O. 88-31 (1989)	Philadelphia Trichloroethane, technical grade, etc.
C80/84 3/12/80 Re, C.J.	International Seaway Trading Corp.	82-11-01607	700.95 or 700.85 12.5%	700.35 8.5% 700.45 10%	Mitsubishi Int'l Corp. v. U.S., S.O. 87-136 (1987)	Boston Postwar
C80/85 3/12/80 Re, C.J.	Kanda Industries	84-4-00667	700.95 or 700.85 12.5%	700.35 8.5% 700.45 10%	Mitsubishi Int'l Corp. v. U.S., S.O. 87-136 (1987)	Seattle Footwear
C80/86 3/13/80 Re, DiCarlo, J.	Minolta Corp.	83-9-01338	410.22 Various rates	408.41 Various rates	Tomogawa U.S.A., Inc. v. U.S., S.O. 88-17 (1988)	Chicago Developer, etc.

ABSTRACTED CLASSIFICATION DECISIONS — Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/87 3/13/90 Aquilino, J.	C.J. Tower & Sons of Buffalo, Inc.	85-10-01499	263.90 Various rates	263.20 Various rates	Agreed statement of facts	Detroit and Port Huron Kraft paper towel stock
C90/88 3/13/90 Aquilino, J.	Endicott Johnson Corp.	87-10-01014	700.95 12.5%	700.35 8.6%	Mitsubishi Int'l Corp. v. U.S., S.O. 87-136 (1987)	New York Footwear
C90/89 3/13/90 Toocalas, J.	V.G. Nahrung Co.	85-4-00603	663.00 Various rates	646.95 Various rates	Agreed statement of facts	Detroit Crates and/or tubes containing revolving door hardware
C90/90 3/14/90 Aquilino, J.	Standard Chlorine Chemical Co.	85-6-00635	407.16 1.7c per lb. + 13.6%	402.72 Various rates	Standard Chlorine Chemical Co. v. U.S., S.O. 89-31 (1989)	Philadelphia Trichlorobenzene, technical grade, etc.

NOTICE OF PROPOSED AMENDMENTS TO THE RULES OF THE UNITED STATES COURT OF INTERNATIONAL TRADE

Chief Judge Edward D. Re, pursuant to the 1988 amendments to the Rules Enabling Act, appointed an Advisory Committee to submit recommendations pertaining to the Rules of the Court.

The Advisory Committee, on February 16, 1990, submitted various recommendations pertaining to Rules 3, 5, 6, 7, 40, 45, 50, 59, 67.1, 68, 71 and Form 9. At the request of the Court's Committee on Rules and Practice, public notice is given to all interested persons who desire an opportunity to comment upon these recommendations.

The recommendations together with the comments of the Advisory Committee on the proposed amendments are attached to this Notice.

Any person interested in submitting comments on the recommendations shall do so in writing by the close of business on Tuesday, May 15, 1990. Comments should be sent to:

Joseph E. Lombardi
Clerk of the Court
United States Court of International Trade
One Federal Plaza
New York, New York 10007

All comments received will be forwarded to the Advisory Committee for review.

Dated: March 30, 1990.

JOSEPH E. LOMBARDI
Clerk of the Court.

WASHINGTON, DC, February 16, 1990

THE HONORABLE EDWARD D. RE
CHIEF JUDGE
UNITED STATES COURT OF INTERNATIONAL TRADE
One Federal Plaza
New York, New York 10007

DEAR CHIEF JUDGE RE:

On behalf of the Court of International Trade Advisory Committee ("Advisory Committee"), I have the honor to submit herewith a report containing the Advisory Committee's proposed amendments to the Rules of the Court of International Trade.

In formulating its report, the Advisory Committee was mindful of the statutory authority and the legislative history underlying the 1988 amendments to the Rules Enabling Act pursuant to which the Committee was created. The Advisory Committee thus studied the Court's rules of practice and procedure with a view to amending or clarifying them where necessary. At the same time, the Advisory Committee was careful to compare the Court's rules to the Federal Rules of Civil Procedure. While only a limited number of amendments to the Court's rules are proposed, the Advisory Committee engaged in a detailed study of the operation of all the rules of the Court to ensure the fullest possible report.

Before outlining the recommendations contained in the report, a review of the procedures followed by the Advisory Committee in examining the Court's rules may be helpful. The Advisory Committee followed a two-phased approach in preparing its report. During phase one, the Advisory Committee performed a comprehensive review of the eighty-nine rules of the Court and the accompanying forms, as well as pertinent case law, legal commentaries, and other available information, to determine whether and to what extent specific rules needed to be amended, clarified, or conformed to the Federal Rules of Civil Procedure.

In order to carry out the review, the Advisory Committee was divided into five subcommittees each of which became responsible for reviewing and reporting in writing upon a specific series of rules. At the same time, individual Advisory Committee members were encouraged to comment upon any of the Court's rules, as desired. At the end of phase one, the Advisory Committee reviewed the five subcommittee reports and, by consensus, chose specific rules to be addressed.

During the second phase of its proceedings, the Advisory Committee sought to elucidate further the specific operational or other deficiencies in the rules and to propose solutions to the problems identified. Detailed subcommittee reports were again prepared and then reviewed by the full Advisory Committee. By consensus, final proposals were formulated.

It should be noted that throughout the Advisory Committee's proceedings, those admitted to practice before the Court, various professional associations, and other interested members of the public were informed of the Advisory Committee's work and were encouraged to submit to the Committee their recommendations as to the rules to be addressed. Notice of the Advisory Committee's formation and function was published in the *Customs Record*, *Customs Bulletin*, *Lawyers Information Bulletin*, *BNA International Trade Reporter*, and the Newsletter of the Customs and International Trade Bar Association. Additionally, on March 31, 1989, a member of the Advisory Committee, speaking at the regional meeting of the Federal Circuit Bar Association, invited the public to participate in the Advisory Committee's review of the Court's rules of practice and procedure. The limited public comments received by the Advisory Committee pursuant to these request were carefully reviewed and considered during the course of the Committee's deliberations.

The enclosed report describes in full the Advisory Committee's recommendations with respect to each of the rules to be amended to clarified. For your convenience, the recommendations may be summarized as follows:

Rule 3: The proposed amendment to Rule 3(b) would reduce the filing fees from \$120 to \$25 for each summons filed in civil actions involving denied protests. A new Rule 3(c) would require a \$95 fee when a complaint is filed in an action described in 28 U.S.C. § 1581(a).

Rule 5: The proposed amendment to Rule 5(b) would add a provision stating that service by regular mail is complete upon mailing. In order to further effectuate this change, a proposed amendment to Rule 5(g) would strike all reference to "service" of papers.

The proposed amendment to Rule 5(b) also would provide for service of papers by the use of a reliable intercity courier. The amendment would treat this form of service as equivalent to service by mail and would establish that service by a reliable intercity courier is completed upon the sender's deposit of the papers with the courier.

Rule 6: The proposed amendment to Rule 6(a) would make clear that the rule, which allows the exclusion of Saturdays, Sundays, and legal holidays from the computation of time when the time prescribed or allowed is less than 11 days, is not affected by a requirement contained in Rule 6(c) that 5 days shall be added to the time prescribed when service is made by mail.

There is also a discrepancy in the wording of Rules 6(a) and 6(c). Rule 6(a) refers to "the period of time prescribed or allowed;" Rule 6(c) refers only to the "prescribed period." The proposed amendment to Rule 6(c) would conform the language in this subsection with that in Rule 6(a).

Proposed amendments to Rules 6(a) and 6(c) also would insert a reference to reliable intercity couriers. As amended, the rule would treat service by a reliable intercity courier as equivalent to service by mail for the purposes of allowing 5 days additional response time.

Rule 7: The proposed amendment to Rule 7(c) would require that unless oral argument has been scheduled pursuant to an order issued under Rule 16(b) or requested in a party's principal brief, a party requesting oral argument in actions instituted pursuant to 28 U.S.C. § 1581(c) must file a motion for oral argument within 20 days after service of the reply brief, or, if no reply brief is filed, the date on which that pleading would have been due. A request for oral argument would be entertained after this period for good cause. If a party does not move for oral argument under the amendment, the Court would have the power to direct oral argument (if desired) or consider the case as one submitted for decision on the briefs.

Rule 40: The proposed amendment to Rule 40(a) would incorporate what has been an administrative requirement of the Court that when a party proposes a trial at a location other than in New York City, all other parties must serve and file a response within a specified period.

Rule 40(c) is proposed to be deleted. Rule 16 provides for a variety of scheduling and planning devices which may be used by the judge assigned to the action.

Rule 45: The proposed amendment to Rule 45(e) would remove any ambiguity which previously existed regarding whether the Court intended to limit its authority to require the attendance of witnesses at hearings and trials where the witness resides more than 100 miles from the place of a hearing or trial. The Advisory Committee believes that the rule, as presently written, may be read to limit unnecessarily the circumstances in which the Court may authorize a subpoena to issue beyond 100 miles.

Rule 50: The proposed practice comment to Rule 50(b) would clarify that the 30-day period available to file a motion for a new trial or for judgment notwithstanding the verdict is intentionally different from the 10-day period available under Rule 50(b) of the Federal Rules of Civil Procedure.

The proposed practice comment to Rule 50(c)(2) would clarify that the 30-day period to move for new trial pursuant to Rule 59 is intentionally different from the 10-day period provided by Rule 50(c)(2) of the Federal Rules of Civil Procedure.

Rule 59: The proposed amendment to Rule 59(a) would provide guidance for the reconsideration of actions decided on the basis of a dispositive motion, an order of dismissal or in any other manner. The proposed amendment also would provide that no response to a motion for rehearing will be permitted unless the Court requests a response, although a motion for rehearing ordinarily will not be granted in the absence of a response.

The proposed practice comment to Rule 59(b) would clarify that the 30-day filing period available to file a motion for a new trial or rehearing is intentionally different from the 10-day period available under Rule 59(b) of the Federal Rules of Civil Procedure.

Rule 67.1: Proposed Rule 67.1 and Form 16 would permit the Clerk of the Court to assess and collect a fee for the handling of funds deposited in the registry of the Court and required to be invested in interest-bearing accounts. The proposed rule is adopted largely from one prepared by the Administrative Office of the United States Courts at the direction of the Judicial Conference of the United States.

Rule 68: The proposed amendment to Rule 68(c) would change the current procedure regarding the filing of a response to an application for attorney's fees. The amendment would provide that a response will not be permitted unless requested by the Court, and that no application will be granted without affording the opportunity to file a response.

Rule 71: The proposed amendment to Rule 71(b)(1) would allow the administering authority or the International Trade Commission to file either the certified index and entire record or the certified index and a partial, stipulated record with the Clerk of the Court within 40 days.

Form 9: The proposed amendment would revise substantially both the format and language of Form 9.

In addition to reviewing the Court's rules, the Advisory Committee has, from time to time, been asked to comment upon other relevant issues. Thus, the Clerk of the Court had asked the Advisory Committee to consider whether the Court's rules should be amended to set forth specific guidelines for service and filing by facsimile transmission. After a careful and detailed review of the issue, the Advisory Committee decided to defer making a specific recommendation to the Court at this time. This decision was based, in part, on the fact that the Judicial Conference of the United States is now examining the question of facsimile transmission. The Judicial Conference's report is due later this year.

The Advisory Committee had also been asked by the Clerk of the Court to comment upon (1) a proposal to provide for a private right of action for dumping, subsidies, and customs fraud, (2) a proposal for new procedures for publication of the Court's opinions and orders, and (3) a proposal to change the method of distributing the list of pending test cases. All of the comments and suggestions made by members of the Advisory Committee with respect to these questions were transmitted to the Clerk of the Court.

Finally, the Advisory Committee has been asked by the Clerk of the Court to express its views on the potential effective date(s) of the amendments proposed in the report. The Advisory Committee would prefer to defer this issue pending a determination by the Court's Committee on Rules of Practice and Procedure as to when the proposed amendments will be put forward for publication and comment.

In conclusion, the Advisory Committee looks forward to working with the Court's Committee on Rules of Practice and Procedure on the task of improving, where necessary, the Court's rules. The Advisory Committee will be pleased to study and respond to any public comments received by the Court in connection with the proposed amendments. The Advisory Committee also will continue to follow developments related to the facsimile issue, as well as other issues affecting the Court's rules of practice and procedure.

Respectfully submitted,
CHARLENE BARSHEFSKY,
Chair,
Advisory Committee.

PROPOSED AMENDMENTS TO THE RULES OF THE COURT OF
INTERNATIONAL TRADE¹

RULE 3. COMMENCEMENT OF ACTION

(b) FILING FEE.

When an action is commenced, a \$120 filing fee shall be paid to the clerk of the Court, except that a \$25 filing fee shall be paid when the action is one described in 28 U.S.C. § 1581(a) or (d)(1).

(c) Complaint Fee.

When a complaint is filed in an action described in 28 U.S.C. § 1581(a), a \$95 fee shall be paid to the clerk of the court.

(e) (d) INFORMATION STATEMENT.

(d) (e) AMENDMENT OF SUMMONS.

(e) (f) NOTICE TO INTERESTED PARTIES.

(f) (g) PRECEDENCE OF ACTION.

ADVISORY COMMITTEE NOTE

The proposed amendment to Rule 3(b) would reduce the filing fees from \$120.00 to \$25.00 for each summons filed in civil actions involving denied protests. The amendment would prevent the excessive payment of hundreds of dollars in filing fees now required in order to raise an issue before the court common to each of several summonses filed in civil actions involving denied protests. A new Rule 3(c) would provide that a \$95 fee shall be paid to the clerk of the court when a complaint is filed in an action described in 28 U.S.C. § 1581(a). The complaint fee is based upon the difference between the present \$120.00 fee and the proposed \$25.00 fee for the commencement of an action under § 1581(a).

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(b) SERVICE—HOW MADE.

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon the party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or by depositing it with a reliable intercity courier for delivery to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery is made by: handing a copy to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. *Service by mail is complete upon mailing. Service by intercity courier is complete upon deposit with the intercity courier.*

¹New text is italicized; deleted text is cancelled. Forms are simply denoted "Proposed."

(g) SERVICE AND FILING—WHEN COMPLETED.

~~Service or filing~~ of any pleading or other paper by delivery or by mailing is completed when received, except that a pleading or other paper mailed by registered or certified mail properly addressed ~~to the party to be served, or to the clerk of the court,~~ with the proper postage affixed and return receipt requested, shall be deemed ~~served or filed~~ as of the date of mailing.

ADVISORY COMMITTEE NOTE

In *Belfont Sales Corp. v. United States*, 12 CIT —, 698 F. Supp. 916 (1988), the court held that for a motion for rehearing to be made by the date required, both filing and service must be completed by that date. While in *Belfont Sales* the filing was completed, service was not. The court held that service is completed when the service copy is (1) actually delivered to all parties required to be served, (2) mailed by certified or registered mail, return receipt requested, or (3) if mailed by other means, actually delivered by the due date and the certificate of service (stating the date of actual delivery) filed with the court.

It appears that the reasoning outlined in *Belfont Sales* may be applied by the court to all motions and other acts required to be accomplished by a date certain. If this were to happen, service by regular mail would be of little use to the parties; they would experience difficulty in guaranteeing delivery prior to the deadline and verifying receipt of the item in question. In addition, certified or registered mail is unnecessarily burdensome and expensive for many litigants and is particularly unwarranted in a court of national jurisdiction where so many of the documents are currently served by ordinary mail.

Therefore, the proposed amendment to Rule 5(b) would add a provision stating that service by regular mail is complete upon mailing. This amendment would bring Rule 5(b) in conformity with Rule 5(b) of the Federal Rules of Civil Procedure ("FRCP").

For these same reasons, the proposed amendment to Rule 5(g) would strike all reference to "service" of papers. Absent this change, Rule 5(g) would continue to provide that service of papers by delivering or mailing is completed when received, except when mailed by registered or certified mail.

The Advisory Committee also recommends that Rule 5(b) be amended to provide for service of papers by the use of a reliable intercity courier. While service by intercity courier is not specifically referred to in the FRCP, the Advisory Committee notes that parties have been using intercity couriers for many years as a substitute for mail and have provided certificates to the court as if this service were by mail, rather than by personal delivery. In order to avoid possible confusion, the rule would be amended to treat this form of service as equivalent to service by mail.

Amended Rule 5(b) would also establish that service by a reliable intercity courier is completed upon the sender's deposit of the papers with the courier. Because a reliable intercity courier should be at least as reliable as, and more expeditious than, mail, the completion of service by reliable courier should be the same as that for mail.

The term "reliable" is used to indicate that the sender should choose a reputable and independent courier that guarantees delivery to the intended recipient within one or two days. The term "intercity" is used to distinguish the type of courier contemplated by the rule from local, intracity messengers, the use of which constitutes a form of personal delivery.

The Advisory Committee considered an amendment to Rule 5(e) to provide for filing by use of a reliable intercity courier. The Advisory Committee believes, however, that it is precluded by 28 U.S.C. § 2632(d) from proposing such an amendment.

RULE 6. TIME**(a) COMPUTATION.**

In computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is Saturday, Sunday, or legal holiday,* or when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed, *exclusive of any additional time that may also be permitted after service by mail or reliable intercity courier*, is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(c) ADDITIONAL TIME AFTER SERVICE BY MAIL or Intercity Courier.

Whenever a party has the right or obligation to do some act or take some proceeding within a prescribed or allowed period after the service of a pleading, motion, or other paper upon the party, and the service is made by mail or *by reliable intercity courier*, 5 days shall be added to the prescribed or allowed period.

ADVISORY COMMITTEE NOTE

A literal reading of existing Rules 6(a) and 6(c) suggests that in cases where service is accomplished by mail, Saturdays, Sundays, and legal holidays may be excluded from the computation of prescribed time only when the period prescribed for reply is less than six days. In *Washington Int'l Ins. Co. v. United States*, 12 CIT —, 681 F. Supp. 883 (1988), the court refused to give Rule 6 such a literal interpretation and held that it is appropriate first to compute the time under Rule 6(a) and then, assuming service of papers is made by regular mail, to add five additional days, as provided for under Rule 6(c). While the proposed amendment to Rule 6(a) would make the Rule different from Rule 6(a) of the FRCP, the amendment would codify the holding of the court in *Washington Int'l*.

There is also a discrepancy (reflected as well in rule 6(e) of the FRCP) in the existing wording of Rules 6(a) and 6(c). Rule 6(a) refers to "the period of time prescribed or allowed;" Rule 6(c) refers only to the "prescribed period." The proposed amendment to Rule 6(c) would conform the language in this section with that in Rule 6(a).

The proposed amendment to Rules 6(a) and 6(c) would also insert a reference to reliable intercity couriers. The meaning of the terms "reliable" and "intercity" are discussed in the Advisory Committee Note to Rule 5.

As amended, the rule would treat service by a reliable intercity courier as equivalent to service by mail for the purpose of allowing 5-days additional response time. The Office of the Clerk and the parties to proceedings before the court have had a longstanding and uniform practice of treating service by intercity courier as service by mail for the purpose of adding 5 days under Rule 6.

The Advisory Committee considered proposing a period of time shorter than 5 days where service is accomplished by intercity courier rather than by mail. However, because actual delivery may occur several days after deposit, e.g., when deposit is made on the Friday before a 3-day weekend or after the last scheduled pickup from an unattended depository box, the Advisory Committee decided to use the same 5-day period as for mail. Furthermore, a period of time other than 5 days would only tend to create confusion. The Advisory Committee believes that to the extent the addition of 5 days would create particular hardship, a party may seek an order of the court to shorten the time.

*As used in these rules, "legal holiday" includes: New Year's Day, January 1; Martin Luther King's Birthday, third Monday in January; Washington's Birthday, third Monday in February; Memorial Day, last Monday in May; Independence Day, July 4; Labor Day, first Monday in September; Columbus Day, second Monday in October; Veterans Day, November 11; Thanksgiving Day, fourth Thursday in November; Christmas Day, December 25; and any other day designated as a holiday by the President or the Congress of the United States.

RULE 7. PLEADINGS ALLOWED—CONSULTATION—ORAL ARGUMENT—RESPONSE TIME—SHOW CAUSE ORDER—FORM OF MOTIONS

(c) ORAL ARGUMENT.

Upon motion of a party, or upon its own initiative, the court may direct oral argument on a motion at a time and place designated as prescribed in Rule 77(c). *Unless oral argument has been scheduled in an order issued pursuant to Rule 16(b), or unless oral argument is requested in a party's principal brief, in actions filed pursuant to 28 U.S.C. § 1581(c), a motion for oral argument shall be filed within 20 days after service of the reply brief or, if the plaintiff has chosen not to file a reply brief, within 20 days after the date upon which a reply brief would have been due. For good cause shown, a motion for oral argument may be made more than 20 days after the service of the reply brief or, if no reply brief is filed, more than 20 days after the date upon which a reply brief would have been due.*

ADVISORY COMMITTEE NOTE

There is no comparable provision to Rule 7(c) in the FRCP. The proposed amendment to Rule 7(c) would expedite decisions in actions instituted pursuant to 28 U.S.C. § 1581(c) (challenges to antidumping and countervailing duty determinations) by reducing delays that may result from uncertainty as to which party is responsible for taking the next step after briefing is completed. Unless oral argument has been scheduled in an order issued pursuant to Rule 16(b) or requested in a party's principal brief, the amendment would require a party requesting oral argument in actions instituted pursuant to 28 U.S.C. § 1581(c) to file a motion for oral argument within 20 days after service of the reply brief, or, if no reply brief is filed, the date on which that pleading would have been due. A request for oral argument can be made after this period for good cause. If a party does not move for oral argument under the amendment, the court can direct oral argument if desired or consider the case as one submitted for decision on the briefs.

RULE 40. REQUEST FOR TRIAL

(a) REQUEST.

At any time after issue is joined in an action, unless the court otherwise directs, any party who desires to try an action shall: (1) confer with the opposing party or parties to attempt to reach agreement as to the time and place of trial, and (2) serve upon the opposing party or parties, and file with the court, a request for trial which shall be substantially in the form set forth in Form 6 in the Appendix of Forms. The request shall be served and filed at least 30 days prior to the requested date of trial, or upon a showing of good cause, at a reasonable time prior to the requested date of trial. A party who opposes the request shall serve and file its opposition within 10 days after service of the request, unless a shorter period is directed by the court. *In all instances where a trial is requested to be held at a location other than or in addition to the courthouse at One Federal Plaza, New York, New York, all other parties shall serve and file a response within 10 days after the service of the request, unless a shorter period is directed by the court.*

(c) MARKED PLEADINGS.

After the action is designated for trial, the party requesting trial shall forthwith serve and file a copy of marked pleadings which shall consist of the following:

- (1) A copy of the complaint and of any third-party complaint briefly indicating in the margin thereof, at each numbered paragraph or article thereof, the manner in which the defendant or respondent, or any third-party defendant or respondent implicated who has served an answer thereto, treats the allegations contained in that paragraph of the complaint or third-party complaint:

(2) A complete and accurate copy of each answer served by the defendant or respondent or any third-party defendant or respondent impleaded in the action; similarly marked when a reply has been filed.

(3) A complete and accurate copy of each reply served in the action.

(d) (c) PREMARKING EXHIBITS.

All exhibits and documents which are intended to be introduced in evidence are to be marked for identification and exhibited to opposing counsel prior to trial or court proceeding.

ADVISORY COMMITTEE NOTE

There is no comparable provision to Rule 40(a) in the FRCP. The proposed amendment to Rule 40(a) would incorporate what has been an administrative requirement of the court when a party requests that trial proceedings be held at a location in addition to or instead of the courthouse at One Federal Plaza, New York, New York. This requirement evolves from the need to schedule courtroom facilities at remote locations and assures that no misunderstanding results in the scheduling of trials at locations other than those proposed and/or responded to by all parties to the action.

Rule 40(c) is proposed to be deleted and Rule 40(d) would be relettered. There are no comparable provisions to Rules 40(c) and 40(d) in the FRCP. The requirement relating to marked pleadings is a carry over from the Rules of the Customs Court. Since that time, the FRCP and the rules of this court have been substantially amended to provide in Rule 16 for a variety of scheduling and planning devices which may be used by the judge assigned to the action. The need for marked pleadings has become obsolete by the frequent and preferable issuance of pretrial orders, which usually require detailed statements of such things as the basis for jurisdiction, the claims of the parties and the contentions of fact and law which are agreed upon and/or are still controverted. Very often, the initial pleadings no longer reflect the issues remaining for trial. In light of this, the additional requirement to serve and file marked pleadings is unnecessary and burdensome. To the extent a judge wishes to require marked pleadings, the authority to do so continues under Rule 16.

Pretrial orders usually provide for the premarking and exchange of exhibits as well as the filing of any objections thereto. The Advisory Committee originally considered eliminating Rule 40(d) in light of this duplication. However, after reconsideration, the Advisory Committee concluded that Rule 40(d) may facilitate and expedite the introduction of exhibits, particularly when the court is conducting a hearing or trial at a remote location. Therefore, the Advisory Committee concluded that it would be desirable, at least at this time, to maintain the requirement for exchanging and premarking in this rule. The Advisory Committee takes no position on the circumstances in which the court, in its discretion, may enforce this rule. Further, if the inclusion of the exchange and premarking of exhibits becomes the practice under Rule 16, future Advisory Committees may reconsider the desirability of retaining the separate requirement in this rule.

RULE 45. SUBPOENA

(e) SUBPOENA FOR A HEARING OR TRIAL.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within 100 miles of the place of hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, or when the interests of justice may require, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

ADVISORY COMMITTEE NOTE

The proposed amendment to Rule 45 would remove any ambiguity which previously existed as to whether the court intended to limit its authority to require the attendance of witnesses at hearings and trials where the witness resides more than 100 miles from the place of a hearing or trial.

Rule 10.1 of the Customs Court (1970), consistent with the national jurisdiction of the court, provided that for good cause shown, the court, upon application of a party, could authorize the service of a subpoena for a hearing or trial at any place. Apparently, in an effort to conform the rules of the court to the FRCP, the language of Rule 45 was drafted to parallel the rules applicable to the district courts, whose jurisdiction is territorially limited.

The Advisory Committee believes that the rule, as currently written, may be read to limit the circumstances in which the court may authorize a subpoena to issue beyond 100 miles to instances where a specific statute authorizes such service. In light of the national jurisdiction of the court, however, Congress has had no reason to enact any specific statutes as it has for the district courts. The Advisory Committee takes no position on the circumstances in which the court should, in its discretion, authorize such service. The Advisory Committee observes, however, that because the court has the authority to travel to various locations throughout the United States—for example, to take testimony—it is certainly advisable that the court's powers to issue subpoenas be clarified, particularly where a trial by jury is involved. The proposed amendment is consistent with the holding of the court in *United States v. DaeWoo Int'l (America) Corp.*, 13 CIT —, 710 F. Supp. 1383 (1989).

RULE 50. MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

* * * * *

PRACTICE COMMENT. Rule 50(b) permits a party simultaneously to move for a new trial and for judgment notwithstanding the verdict. The time for filing a motion for a new trial in the court, 30 days, is governed by 28 U.S.C. § 2646. To avoid confusion and inefficiency, Rule 50(b) provides the same 30-day filing period for any motion filed thereunder. In contrast, Rule 50(b) of the Federal Rules of Civil Procedure provides a 10-day period. However, motions for new trials in courts in which the Federal Rules of Civil Procedure apply are not subject to 28 U.S.C. § 2646.

PRACTICE COMMENT. Rule 50(c)(2) provides a 30-day period within which to move for a new trial pursuant to Rule 59. The corresponding period provided by Rule 50(c)(2) of the Federal Rules of Civil Procedure is 10 days. The lengthier period to file such a motion in the court is mandated by 28 U.S.C. § 2646.

ADVISORY COMMITTEE NOTE

The proposed practice comment to Rule 50(b) would clarify that the 30 day period available to file a motion under Rule 50(b) is intentionally different from the 10-day filing period available under Rule 50(b) of the FRCP. Rule 50(b) contemplates the joining of a motion for judgment notwithstanding the verdict with a motion for a new trial. Motions for new trials are subject to a 30-day filing period provided by 28 U.S.C. § 2646. Even though motions for judgments notwithstanding the verdict are not subject to this mandate, the Advisory Committee believes that in order to avoid confusion it is preferable that Rule 50(b) be internally consistent with Rule 50(c)(2).

The proposed practice comment to Rule 50(c)(2) would clarify that the 30-day period to move for a new trial is intentionally different from the 10-day period provided by Rule 50(c)(2) of the FRCP. Rule 50(c)(2) is controlled by 28 U.S.C. § 2646, a statute not applicable to the district courts.

RULE 59. NEW TRIALS—REHEARINGS—AMENDMENT OF JUDGMENTS**(a) GROUNDS.**

A new trial or rehearing may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, or determined on the basis of a dispositive motion, order of dismissal, or in any other manner, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. *No response to a motion for rehearing shall be permitted unless requested by the court, but a motion for rehearing ordinarily shall not be granted in the absence of such a request.* On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

* * * * *

PRACTICE COMMENT. Rule 59(b) provides for a 30-day period within which to move for a new trial or rehearing. In contrast, Rule 59(b) of the Federal Rules of Civil Procedure provides for a 10-day period. The lengthier period is required by 28 U.S.C. § 2646, a statute not applicable to the district courts.

ADVISORY COMMITTEE NOTE

The proposed amendment to Rule 59(a) would provide guidance for the reconsideration of actions determined on the basis of a dispositive motion, an order of dismissal, or in any other manner. The current text of Rule 59 appears to have been written with trials in mind and does not contemplate reconsideration of other types of cases which form a significant portion of actions heard before the Court. For this reason, the Advisory Committee believes that a departure from Rule 59(a) of the FRCP is warranted.

The proposed amendment to Rule 59(a) would also provide that no response shall be filed to a motion for rehearing unless the court requests a response, although a motion for rehearing shall ordinarily not be granted in the absence of a response. The standards which must be met in order to obtain rehearing are so strict that it appears to be unnecessary to burden a prevailing party with the need to respond to a motion unless the court believes that a response is necessary.

The proposed practice comment to Rule 59(b) would clarify that the 30-day filing period available to file a motion for a new trial or rehearing is intentionally different from the 10-day period available under Rule 59(b) of the FRCP. The lengthier period is required under 28 U.S.C. § 2646, a statute not applicable to the district courts.

RULE 67. DEPOSIT IN COURT

* * * * *

RULE 67.1. DEPOSIT IN COURT PURSUANT TO RULE 67**(a) Order for Deposit—Interest Bearing Account.**

Whenever a party seeks a court order for money to be deposited by the clerk in an interest-bearing account, the party shall provide the proposed order to the clerk or financial deputy who will inspect the proposed order for proper form and content and compliance with this rule prior to signature by the judge for whom the order is prepared. The proposed order shall be substantially in the form set forth in Form 16 of the Appendix of Forms.

(b) Orders Directing Investment of Funds by Clerk.

Any order obtained by a party or parties in an action that directs the clerk to invest in an interest-bearing account or instrument funds deposited in the registry of the court pursuant to 28 U.S.C. § 2041 shall include the following:

- (1) the amount to be invested;
- (2) the name of the depository approved by the Treasurer of the United States as a depository in which funds may be deposited;
- (3) a designation of the type of account or instrument in which the funds shall be invested;
- (4) wording which directs the clerk to deduct from the income earned on the investment a fee, consistent with that authorized by the Judicial Conference of the United States and set by the Director of the Administrative Office, equal to the first 45 days of income earned on the investment, whenever such income becomes available for deduction from the investment so held and without further order of the court.

PRACTICE COMMENT. Proposed Rule 67.1 would bring the practice in the court into conformity with the practice in courts whose fees are set by the Judicial Conference of the United States under the authority of 28 U.S.C. §§ 1913, 1914, and 1930. See 54 Fed. Reg. 20407 (May 11, 1989).

Application. The fee would be assessed on all registry fund investments as follows:

For new accounts (i.e., those investments made on or after the effective date of the fee), the fee would be equal to the first 45 days of income earned on the account. Each subsequent deposit of new principal into the registry, in the same case or proceeding in which other deposits have been made, would be subject to the fee. However, reinvestment of previously deposited principal would not be subject to the fee.

For existing accounts (i.e., those investments held by the court on the day prior to the effective date of the fee), a fee would be assessed equal to the first 45 days of income earned on such existing accounts, beginning 30 days after the effective date of the fee. As discussed above, subsequent deposits of new principal in the same account would be subject to the fee. Subsequent reinvestment of existing deposits would not be subject to the fee.

The fee would apply only once to each sum deposited regardless of the length of the time actually held in the registry and would not exceed the income actually earned on the account.

The fee would be deducted at the time the income is credited to the account.

As with other miscellaneous fees authorized under 28 U.S.C. §§ 1913, 1914 and 1930, and adopted by the court, this fee could be taxed as costs by the court. In cases where the U.S. Government is a party to the action underlying the registry investment, the funds initially withheld in payment of the registry fee could be restored to the United States upon application filed with the court by the Assistant Attorney General or other Government Counsel.

PROPOSED FORM 16

UNITED STATES COURT OF INTERNATIONAL TRADE

PLAINTIFF *v.* DEFENDANT

Court No. _____

Before:

ORDER OF DEPOSIT AND INVESTMENT

On this day came to be heard plaintiff's request to deposit funds in the registry of the United States Court of International Trade and the investment of said sums in a passbook savings account at [name of the bank] and the court decided to grant the same; it is therefore,

ORDERED that the clerk accept and deposit into the registry of the court the deposit made by defendant in this cause of \$(amount); it is further

ORDERED that the clerk promptly and properly invest said monies as stipulated and pursuant to Rule 67.1 of the United States Court of International Trade and deduct the registry fee as stated therein from the income earned over the first 45 days such sums remain so deposited and invested in the court's registry.

DONE at New York, New York this [date].

Judge [name]

Approved:

Attorney for Defendant (Plaintiff)
[Address]
[Telephone number]

Verified by:

Clerk of the Court
United States Court of International Trade

ADVISORY COMMITTEE NOTE

Proposed Rule 67.1 and Form 16 would permit the clerk to assess and collect a fee for the handling of funds deposited in the registry of the court which are required to be invested in interest-bearing accounts. The fee would be equal to the income earned during the first 45 days after the funds are invested, or, if the funds remain on deposit for a shorter period, the income earned during such shorter period.

The proposed rule is largely adopted from one prepared by the Administrative Office of the United States Court at the direction of the Judicial Conference of the United States. See 54 Fed. Reg. 20407 (May 11, 1989). It is thus consistent with existing practice in the district courts and bankruptcy courts. Prior to the adoption of the parallel rule by the Director of the Administrative Office, that office conducted a study of the practices of financial institutions and court systems. These studies and the practice now established in the district courts and bankruptcy courts support the adoption of a similar fee in the court.

It should be noted that the Advisory Committee's proposed Rule 67.1 and Form 16 differ, in several respects, from those adopted by the Administrative Office of the United States Courts. First, the Advisory Committee eliminated the requirement that a party seeking a court order for money to be deposited by the clerk in an interest-bearing account personally deliver the proposed order. The Advisory Committee believes that given the court's national jurisdiction, such a requirement would be unnecessarily burdensome and expensive. Second, the Advisory Committee inserted a reference to Form 16 in Rule 67.1(a). No specific reference to the form appears in the rule adopted by the Administrative Office even though the form is intended to be uti-

lized. Finally, the Advisory Committee made several minor grammatical changes to the text adopted by the Administrative Office.

RULE 68. ATTORNEY'S FEES AND EXPENSES

(c) RESPONSE AND REPLY.

~~The responding party shall have 30 days from the date of service of the application to file a response. No response shall be permitted unless requested by the court, but no application shall be granted without an opportunity to submit a response. In the event the court requests that a response be filed, the party responding shall have 30 days from notice of entry of the order requesting a response to file its response. No other papers or briefs shall be allowed, except as the court, upon its own initiative, shall direct.~~

ADVISORY COMMITTEE NOTE

There is no comparable provision to Rule 68(c) in the FRCP. The proposed amendment to Rule 68(c) would change the current procedure regarding the filing of a response to an application for attorney's fees. Under the current rule, in practice, the party against whom an application is made responds in virtually all instances since the responding party has no assurance that the court, based upon its own familiarity with the record and issues presented in the case, would determine not to grant the application. It is believed that this often results in the filing of unnecessary responses and in the extensive briefing of issues which the court need not address. *Cf. Bergen Hudson Roofing Co. v. United States*, 13 CIT —, slip op. 89-176 (Dec. 28, 1989).

The proposed amendment would thus provide that a response shall not be permitted unless requested by the court, and that no application shall be granted without affording the opportunity to file a response. The proposed amendment would follow the procedure set forth in Rule 47.9 of the United States Court of Appeals for the Federal Circuit. Since the application is dispositive in nature, the Advisory Committee believes that it is appropriate to retain the 30-day period currently provided for a response when one is requested by the court.

RULE 71. DOCUMENTS IN AN ACTION DESCRIBED IN 28 U.S.C. § 1581 (c) OR (f)

(b) ALTERNATIVE PROCEDURE IN AN ACTION DESCRIBED IN 28 U.S.C. § 1581(c).

As an alternative to the procedures prescribed in subdivision (a) of this rule in an action described in 28 U.S.C. § 1581(c):

(1) Within ~~10~~ 40 days after the date of service of the complaint upon the administering authority or the International Trade Commission, the administering authority or the Commission may file with the clerk of the court a certified list of all items described in subdivisions (a)(1) and (a)(2) of this rule, *along with a copy of the documents which the parties have designated will constitute the agency record. The administering authority or the International Trade Commission shall serve a copy of the certified list upon the plaintiff forthwith, and forthwith serve a copy of the certified list upon the plaintiff, within 10 days after the date of service of the certified list, the plaintiff shall either stipulate with the agency that the filing of the certified list alone shall constitute the record or shall designate those items contained in the certified list which it wishes to be filed with the clerk of the court. If the parties stipulate that the certified list alone shall constitute the record, the plaintiff shall forthwith file a copy of the stipulation with the clerk of the court. If the plaintiff designates those items contained in the certified list which it wishes to be filed with the*

clerk of the court, the plaintiff shall serve such designation upon the agency within 10 days after the filing of the certified list, within 10 days after the date of service of plaintiff's designation, the agency shall file the designated items, as well as any other items from the certified list which the agency deems relevant, with the clerk of the court.

* * * * *

ADVISORY COMMITTEE NOTE

The proposed amendment to Rule 71(b)(1) would simplify the current procedure by allowing the administering authority or the International Trade Commission to file either the certified index and entire record or the certified index and a partial, stipulated record with the clerk of the court within 40 days. By proposing to eliminate most of the rigorous requirements currently required under the rule, including the requirement that the agency file a certified index within 10 days of service of the complaint, the Advisory Committee believes that Rule 71(b)(1) will prove much more useful and will be used more frequently in actions under 28 U.S.C. § 1581(c). Often, the agency must resort to filing the entire record with no attempt at stipulation since it cannot meet, in a timely manner, the current requirement that the certified index be filed within 10 days. Use of the proposed alternative procedure would result in substantial government savings, in terms of microfilming time and costs, and would encourage the parties to narrow the issues early in the litigation.

The Advisory Committee notes that it was assured by both the administering authority and the International Trade Commission that adoption of this amendment would not delay the filing of the administrative record.

PROPOSED FORM 9

UNITED STATES COURT OF INTERNATIONAL TRADE

[BEFORE (Insert name of Judge if assigned) [1]

PLAINTIFF[s] v. THE UNITED STATES, DEFENDANT.

Court No[s]. _____, [etc. [2]]

See attached Schedule[s] [3]

Port[s]: [(List applicable port[s] of entry) [4]

STIPULATED JUDGEMENT ON AGREED STATEMENT OF FACTS

[This action] [These actions], as prescribed by Rule 58.1 of the Rules of the United States Court of International Trade, [is] [are] stipulated for judgment on the following agreed statement of facts in which the parties agree that:

1. The protest[s] involved here [was] [were] filed and the action[s] involved here [was] [were] commenced within the time provided by law, and all liquidated duties, charges or exactions have been paid prior to the filing of the summons(es).

2. The imported merchandise covered by the [entry] [entries] set forth on Schedule ["A"] ["B"], [5] attached, consists of [(Describe imported merchandise. The description should be sufficiently specific to enable the Customs Service to identify the stipulable articles. Appropriate general terms or inclusion of descriptions on Schedule may be used.)]

3. The imported merchandise was classified by the Customs Service as [(describe)] under [(insert pertinent tariff provision[s])] at the rate[s] of [(insert tariff rate[s])] [, depending upon the date of entry],[6]

4. The stipulable imported merchandise is classifiable as [(describe)] under [(insert pertinent tariff provisions[s])] at the rate[s] of [(insert tariff rate[s])] [, depending upon the date of entry],[7]

5. The imported merchandise, covered by the entries set forth on the attached schedule, which have been marked with the letter[s] ["A"] [and] ["B"] [8] and initialed _____ [9] by _____ [10], of the Customs Service, [11] is stipulable in accordance with this agreement.

6. Any refunds payable by reason of this judgment are to be paid with any interest provided by law.

7. All other claims and non-stipulable entries [12] are abandoned.

Court No[s]. [(insert lead number [etc.])]
See attached Schedule[s]

Respectfully submitted,

By: _____
Attorney[s] for Plaintiff[s]

[(Insert name of firm, address & telephone number)]

Assistant Attorney General Civil Division

By: _____
[(Insert name of Attorney in Charge)]
Attorney in Charge
International Trade Field Office

[(Insert name of applicable DOJ attorney) [13]]
Dept. of Justice, Civil Division
Commercial Litigation Branch
26 Federal Plaza
New York, New York 10278
Tel.: (212) 264-9230
Attorneys for the United States

It is HEREBY ORDERED that [this action] [these actions] [is] [are] decided and this final judgment is to be entered by the Clerk of this Court; the appropriate Customs Service officials shall [reliquidate the] [entry] [entries] [and] [14] make refund in accordance with the stipulation of the parties set forth above.

Judge (insert name)

Date: _____

SCHEDULE [A] [B] TO STIPULATED JUDGMENT[15]

Port: [(insert port of entry)]

File or Assignment	Court #	Protest #	Entry #	Description of Merchandise[16]
(Date Summons Filed)[17]				

ENDNOTES

1. Endnotes are for guidance in preparation of document and are not part of the final document. Material in brackets should be selected and/or modified depending on whether singular or plural text, et cetera, is applicable, and inserted into the text of the document; the brackets themselves are ordinarily not part of the final document.

2. If more than one case.

3. The Schedule should contain, the court number[s], the date[s] of the filing of the summons[es], the protest number[s] and the entry number[s]. The civil actions should be arranged in ascending order, and the name of the Judge assigned, and/or reserve or suspension file in which the case resides, should be set forth.

4. If more than one port of entry is covered by a single stipulated judgment ("stipulation") covering a civil action, separate pages of the schedule (see n. 3) should be used for listing each different port and its applicable entries and protests. Civil actions involving different ports of entry should not normally be combined on a single stipulation, since the need to consider the entries at the ports involved will usually delay the stipulation until all ports respond; in such instances, it is preferable that separate stipulations be prepared.

5. See n. 4.

6. If appropriate, as an addition or an alternative:

3. The imported merchandise was appraised by the Customs Service upon the basis of [(describe and insert statutory provision[s])] at a value of [(describe)].

7. If appropriate, as an addition or an alternative:

4. Plaintiff claims that the imported merchandise should be appraised upon the basis of [(describe and insert statutory provision[s])] at a value of * * * (describe)].

8. Different letters should be used if the entries were previously marked on a different stipulation with the letter "A" or if the stipulation covers merchandise stipulated under more than one tariff provision and/or at different appraised values. More than one letter is required to distinguish merchandise stipulable under different provisions or at different appraised values.

9. Initials to be inserted by the Government.
10. See n. 9. Name of person to be inserted by the Government.
11. If appropriate, insert:

is the same [similar] in all material respects as the merchandise in [(insert complete case citation)] and,

12. In the event the civil action[s] covered by the stipulation include[s] non-stipulable entries (e.g., no stipulable merchandise, untimely entries, increased duties not timely paid), such entries should be clearly marked with an asterisk (*) on each page on which they appear, including schedules, with the footnote: "** All claims arising from this entry are abandoned."

13. To be completed by either plaintiff's or defendant's counsel.

14. In most instances the parties will prefer that the refund be effectuated by having the entry(ies) reliquidated; in other instances the parties may agree that a refund should be made without the necessity of reliquidation.

15. See nn. 3 and 4.

16. [(See paragraph 2 of stipulated judgment and include if necessary. Otherwise omit.)]

17. To be inserted below each separate court number.

ADVISORY COMMITTEE NOTE

Rule 58.1 is a rule that is unique to the jurisdiction of the court. Pursuant to Rule 58.1, in any action described in 28 U.S.C. §§ 1581(a) or (b), the parties may stipulate to the entry of a final judgment, at any time (without the filing of a complaint, brief or formal amendment of any pleading), by filing with the clerk of the court an original and copy of a stipulation for judgment signed by the parties or their attorneys, together with a proposed stipulated judgment. This has been the long standing method by which the parties effectuate the settlement of individual cases or large groups of cases, based upon negotiated agreement among the parties.

Usually, the process begins with the plaintiff drafting a proposed "stipulation [also commonly called a submission] for judgment on agreed statements of facts" and submitting it to the defendant, which in these actions is the United States. The practice has been to submit an original and two or three copies of the draft, which is presented in final form so that it can be filed if no changes are necessary. The submission is usually accompanied by a cover letter and/or memorandum, with or without attachments, which includes additional facts and arguments as to why the plaintiff now believes that the government should settle the litigation. Normally, government counsel (the Department of Justice) then consults with other government officials and the plaintiff's attorney in order to ascertain whether an overall agreement may be reached. Frequently, it is necessary to have the court transmit the entry documents (hundreds of entries may be covered by a single civil action) to Customs Service offices in different parts of the country, in order to evaluate the overall proposal and then to verify, as necessary, on an entry by entry basis, whether jurisdictional requirements have been satisfied, whether the entry includes stipulable merchandise and so forth. This is a time-consuming process and may have to be repeated if further negotiations with counsel for plaintiff indicate additional review is necessary. Also, when entry documents are missing from the court file or were lost prior to the institution of the civil action, additional time may be required to reconstruct the missing entries or for plaintiff to abandon claims as to those entries.

Once an agreement is reached with respect to all or some of the entries, a "confirmed copy" of the government's revisions of the submission is returned to the plaintiff. This may result in further negotiations and/or the transmission of a proposed "stipulated judgment on agreed statement of facts" (stipulated judgment) being submitted to the government by plaintiff. Normally an original and three copies are sent with an accompanying letter authorizing the government to file the original submission and the original and one copy of the stipulated judgment with the court. First, however, the language of the stipulated judgment must meet with the approval of the government and further negotiations may be necessary. Additionally, the

schedule of cases and entries must be compared with the schedule of cases and entries from the submission; errors or omissions must be rectified. Once a final agreement is reached the documents are revised if necessary and are filed with the court by the government. A copy of the stipulated judgment is sent to counsel for the plaintiff indicating filing. Eventually, after court personnel process these pleadings and ascertain if the information regarding such things as form, entry numbers, civil action numbers, ports, et cetera, meets the court's requirements, the documents are either referred, as required, to a judge for approval and/or for approval by the clerk, pursuant to Rules, 58.1, 81 and 82. After the entry of judgment and the period for rehearing has elapsed, the judgment order and entry papers are sent to the Customs Service at the ports of entry for further action in accordance with the judgment.

While the current Form 9 has been utilized for many years, a number of changes have occurred which the Advisory Committee believes necessitate the form's substantial revision. First, the revisions made in 1980 to the prior Form, "Appendix C" of the Rules of the Customs Court (1970), were mostly technical changes in language; the format and language did not undergo a comprehensive review, taking into consideration changes in the court's jurisdiction and powers, particularly with respect to the type of relief which might be awarded. Second, with the court's expanded jurisdiction, the makeup of the court's bar has undergone considerable change and has become greatly diversified. Numerous firms and individual practitioners have been added to what was once a group of firms which specialized solely in customs litigation. Consequently, with a more diversified bar, some of the terminology and concepts set forth in the current Form 9 are not self-explanatory and are ambiguous or confusing. Third, the Customs Service has undergone considerable internal change in the way in which it evaluates and processes both the proposed submissions and final judgment orders of the court. It has been hampered in its ability to process these documents because of terminology present in the current Form 9. Finally, while the process described in the introduction to this note has proven to be relatively inexpensive and expedient way of resolving large numbers of cases, the two step review of a submission and separate stipulated judgment is costly and time-consuming.

Over the years, the Department of Justice, with the cooperation of the Customs Service and attorneys from the private sector, has, on a case by case basis, attempted to adjust the language of the stipulated judgment to meet the needs of current practice. However, some limitations on the ability to do so arises from the text of the current Form. The Advisory Committee believes that the proposed new Form 9 would address all of these concerns and would provide a simple, clear format that could be readily understood and easily completed by general practitioners. Moreover, since the proposed form would combine what was previously two separate documents into one, the form would significantly reduce the expense and time required by the parties and the court to prepare, review, process, and implement the disposition of cases. Finally, by proposing to remove certain archaic language, the new form would greatly enhance the ability of the Customs Service expeditiously and inexpensively to implement the court's order to make refunds. The Advisory Committee recognizes that the parties may still, on a case by case basis, find it necessary to make minor adjustments in the Form to meet the requirements of their case; this would be permissible under the terms of Rule 58.1. The new Form 9, however, should serve as a clear model for many years to come.

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U.S. Court of Appeals for the Federal Circuit (Trade Cases), Vol. 6, Oct. 1987-Oct. 1988; Sup. Docs. Stock No. 028-002-00048-3; Cost: \$13 domestic, \$16.25 foreign.

Dissolved in water, temperature in degrees	
100	100.0
90	99.9
80	99.8
70	99.7
60	99.6
50	99.5
40	99.4
30	99.3
20	99.2
10	99.1
0	99.0
-10	98.9
-20	98.8
-30	98.7
-40	98.6
-50	98.5
-60	98.4
-70	98.3
-80	98.2
-90	98.1
-100	98.0

These values are for pure water. The actual values for a solution will be slightly different.

The following table gives the values for the specific heat of water in calories per gram per degree Celsius.

Specific heat of water in calories per gram per degree Celsius	
100	1.000
90	0.999
80	0.998
70	0.997
60	0.996
50	0.995
40	0.994
30	0.993
20	0.992
10	0.991
0	0.990
-10	0.989
-20	0.988
-30	0.987
-40	0.986
-50	0.985
-60	0.984
-70	0.983
-80	0.982
-90	0.981
-100	0.980

These values are for pure water. The actual values for a solution will be slightly different.

The following table gives the values for the thermal conductivity of water in calories per centimeter per second per degree Celsius.

Thermal conductivity of water in calories per centimeter per second per degree Celsius	
100	0.00143
90	0.00142
80	0.00141
70	0.00140
60	0.00139
50	0.00138
40	0.00137
30	0.00136
20	0.00135
10	0.00134
0	0.00133
-10	0.00132
-20	0.00131
-30	0.00130
-40	0.00129
-50	0.00128
-60	0.00127
-70	0.00126
-80	0.00125
-90	0.00124
-100	0.00123

